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United States

Circuit Court of Appeals

For the Ninth Circuit.

AUK BAY SALMON CANNING COMPANY, a Corporation,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Territory of Alaska, Division No. 1.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

CHICKERING and GREGORY, Merchants Exchange Bldg., San Francisco, California,

KERR, McCORD & IVEY, Hogue Bldg., Seattle, Wash.,

R. E. ROBERTSON, Esq., Juneau, Alaska, and

H. L. FAULKNER, Esq., Juneau, Alaska,
Attorneys for Plaintiff in Error.

ARTHUR G. SHOUP, Esq., United States Attorney, Juneau, Alaska,
Attorney for Defendant in Error.

In the District Court for the District of Alaska, Division Number One.

THE UNITED STATES OF AMERICA

vs.

AUK BAY SALMON CANNING COMPANY, a Corporation.

INDICTMENT.

Section 1, Ch. 95, Session Laws of Alaska, 1923—
870–KB.

At the special September term of the District Court, within and for the District of Alaska, Division Number One, in the year of our Lord one thousand nine hundred and twenty-three, begun and held at Ketchikan, in said district, beginning September 24, 1923.

COUNT ONE.

The Grand Jurors of the United States of America, selected, impanelled, sworn, and charged within and for the District of Alaska, accuse AUK BAY SALMON CANNING COMPANY, a Corporation, at all times mentioned herein duly organized and existing as such, by this indictment of the crime of unlawful fishing, committed as follows:

The said AUK BAY SALMON CANNING COMPANY, a corporation, between the 10th day of August, 1923, and the first day of September, 1923, to wit, on August 10, 1923, in the waters of Lynn Canal, W. side of Mansfield Peninsula, same being waters of Alaska over which the United States has jurisdiction, and in Division No. One, District of Alaska, and within the jurisdiction of this Court, did wilfully and unlawfully fish for salmon for commercial purposes by means of a fish trap, Territorial License No. 23–394, then and there located as aforesaid, and east of 139th meridian west longitude and between the 57th degree north latitude and 60th degree north latitude.

And so the Grand Jurors duly selected, impaneled, sworn, and charged as aforesaid, upon their oaths do say: That AUK BAY SALMON CANNING COMPANY, a corporation, did then and there commit the crime of unlawful fishing in the manner and form aforesaid, contrary to the form of the statutes in such cases made and provided,

and against the peace and dignity of the United States of America. [1*]

COUNT TWO.

The Grand Jurors of the United States of America, selected, impanelled, sworn, and charged within and for the District of Alaska, accuse AUK BAY SALMON CANNING COMPANY, a corporation, at all times mentioned herein duly organized and existing as such, by this indictment of the crime of unlawful fishing, committed as follows:

The said AUK BAY SALMON CANNING COMPANY, a corporation, between the 10th day of August, 1923, and the first day of September, 1923, to wit, on August 11, 1923, in the waters of Chatham Straits, N. W. from Parker Pt., W. side Admiralty Island, the same being waters of Alaska over which the United States has jurisdiction, and in Division No. One, District of Alaska, and within the jurisdiction of this Court, did wilfully and unlawfully fish for salmon for commercial purposes by means of a fish trap, Territorial License No. 23–284, then and there located as aforesaid, and east of 139th meridian west longitude and between the 57th degree north latitude and 60th degree north latitude.

And so the Grand Jurors, duly selected, impanelled, sworn, and charged as aforesaid, upon their oaths do say: That AUK BAY SALMON CANNING COMPANY, a corporation, did then and there commit the crime of unlawful fishing in the manner and form aforesaid, contrary to the form

*Page-number appearing at foot of page of original Certified Transcript of Record.

of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

COUNT THREE.

The Grand Jurors of the United States of America, selected, impanelled, sworn, and charged within and for the District of Alaska, accuse AUK BAY SALMON CANNING COMPANY, a corporation, at all times mentioned herein duly organized and existing as such, by this indictment of the crime of unlawful fishing, committed as follows:

The said AUK BAY SALMON CANNING COMPANY, a corporation, between the 10th day of August, 1923, and the first day of September, 1923, to wit, on August 15, 1923, in the waters of Lynn Canal, at Point Retreat, W. side of Mansfield Peninsula, the same being waters of Alaska over which [2] the United States has jurisdiction, and in Division No. One, District of Alaska, and within the jurisdiction of this Court, did wilfully and unlawfully fish for salmon for commercial purposes by means of a fish trap, Territorial License No. 23–393, then and there located as aforesaid, and east of the 139th meridian west longitude and between the 57th degree north latitude and 60th degree north latitude.

And so the Grand Jurors duly selected, impanelled, sworn, and charged as aforesaid, upon their oaths do say: That AUK BAY SALMON CANNING COMPANY, a corporation, did then and there commit the crime of unlawful fishing in the manner and form aforesaid, contrary to the form of the statutes in such cases made and provided, and

against the peace and dignity of the United States of America.

A. G. SHOUP,
United States Attorney.

WITNESSES:

M. J. O'Connor.

Presented by F. J. Hunt, Foreman of the Grand Jury, in the presence of the Grand Jury, in open court and filed in open court with the Clerk of the District Court, all on this 5th day of Oct., 1923.

JOHN H. DUNN,
Clerk.

[Endorsed]: No. 1610–B. District Court, District of Alaska, First Division. The United States vs. Auk Bay Salmon Canning Company, a Corporation. Indictment—Vio. Sec. 1, Ch. 95, Session Laws of Alaska, 1923. Unlawful Fishing. A True Bill. Forest J. Hunt, Foreman. A. G. Shoup, U. S. Attorney. [3]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 1610–B.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

AUK BAY SALMON CANNING COMPANY, a Corporation,
Defendant.

MOTION TO QUASH INDICTMENT.

Comes now the defendant and moves this Honorable Court to quash the indictment herein on the following grounds, to wit:

1. That Chap. 95, A. S. L. 1923, is contrary to the Act of Congress of August 24, 1912, and particularly to Section 3 thereof in that it amends, modifies, alters and repeals the game and fish laws of the United States applicable to Alaska.

2. That Chap. 95, A. S. L. 1923, is contrary to the Act of Congress of August 24, 1912, and particularly to Section 9 thereof in that, without the affirmative approval of Congress, it grants to certain corporations, associations and individuals certain special and exclusive immunities, privileges and franchises.

3. That Chap. 95, A. S. L. 1923, is contrary to the Act of Congress of August 24, 1912, and particularly to section 9 thereof, in that it is contrary to the Act of Congress of July 30, 1886, and particularly in that it (a) is a local and special law for and in relation to the protection of game and fish and (b) grants certain corporations, associations and individuals certain special and exclusive privileges, immunities and franchises. [4]

4. That Chap. 95, A. S. L. 1923, is contrary to the Act of Congress of August 24, 1912, and particularly to Section 9 thereof in that it is contrary to the Constitution of the United States and violates:

(a) The "equal protection of the laws" clause of the 14th Amendment of said Constitution.

(b) The 14th Amendment of said Constitution, and abridges the privileges and immunities of citizens of the United States.

(c) The "due process of law" clause of the 5th and 14th amendments of said Constitution.

5. That the taking or fishing for salmon in the manner and at the time and place and for the purpose as set forth in the indictment is not a crime against the peace or dignity of the United States, and that the legislature of Alaska is without, and never has had, authority or power to make such taking or fishing for salmon a crime against the peace or dignity of the United States.

And in support of this motion defendant alleges that it is a citizen of the United States of America.

Respectfully submitted:

H. L. FAULKNER,
R. E. ROBERTSON,
Attorneys for Defendant.

Copy received Nov. 19, 1923.

L. O. GORE,
Asst. U. S. Atty.

Filed in the District Court, Territory of Alaska, First Division. Nov. 20, 1923. John H. Dunn, Clerk. By ————, Deputy. [5]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 1610–B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AUK BAY SALMON CANNING COMPANY, a Corporation,

Defendant.

DEMURRER.

Comes now the defendant by its attorneys, H. L. Faulkner and R. E. Robertson, and demurs to the indictment filed herein on the following grounds:

I.

That the facts stated in said indictment do not constitute a crime.

II.

That the indictment does not conform to the requirements of Chapter 7 of Title 15 of the Code of Criminal Procedure, Compiled Laws of Alaska.

R. E. ROBERTSON.
H. L. FAULKNER.

Copy received Nov. 21, 1923.

A. G. SHOUP,
U. S. Atty.
By H. D. STABLER,
Sp. Asst. U. S. Atty.

Filed in the District Court, Territory of Alaska, First Division. Nov. 21, 1923. John H. Dunn, Clerk. By ————, Deputy. [6]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 1610–B—(870–KB).

UNITED STATES OF AMERICA

vs.

AUK BAY SALMON CANNING COMPANY, a Corporation.

ORDER DENYING MOTION TO QUASH.

This matter coming on to be heard upon the motion of the defendant to quash the indictment filed herein and upon defendant's demurrer to the indictment, and argument having been heard,—

IT IS HEREBY ORDERED that the motion to quash the indictment be denied; exception allowed to defendant.

AND IT IS FURTHER ORDERED that the demurrer of defendant be sustained as to Count One of the indictment and be overruled as to Counts Two and Three of the indictment. Exception allowed to defendant.

Dated at Juneau, Alaska, December 29, 1923.

THOS. M. REED,

Judge.

Entered Court Journal No. 1, page 492.

Filed in the District Court, Territory of Alaska, First Division. Jan. 9, 1924. John H. Dunn, Clerk. By ————, Deputy. [7]

United States of America, District of Alaska.

In the District Court of the United States for the District of Alaska, Division Number One.

No. 870–KB.

THE UNITED STATES OF AMERICA

vs.

AUK BAY SALMON CANNING COMPANY, a Corporation.

VERDICT.

Special April, 1924, Term.

We, the jury impaneled and sworn in the above-entitled cause find the defendant . . . guilty as charged in Count 2 of the indictment.

We, the jury impaneled and sworn in the above-entitled cause, find the defendant . . . guilty as charged in Count 3 of the indictment.

Dated at Ketchikan, Alaska, April 21, 1924.

P. J. GILMORE,
Foreman.

Entered Court Journal, No. 1, pages 273–4.

Filed in the District Court, Territory of Alaska, First Division. April 21, 1924. John H. Dunn, Clerk. By ————, Deputy. [8]

In the District Court for the District of Alaska, Division Number One, at Ketchikan.

No. 870–KB.

UNITED STATES OF AMERICA

vs.

AUK BAY SALMON CANNING COMPANY, a Corporation.

JUDGMENT AND SENTENCE.

This matter coming on to be heard for the imposition of sentence upon the above-named defendant upon the verdict of the jury impaneled, sworn and charged in said cause by which verdict said defendant was found guilty of the crime of unlawful fishing in violation of Section 1, Chapter 95, 1923 Session Laws of Alaska, as charged in Count 2 of the indictment on file herein and found guilty of the crime of unlawful fishing in violation of Section 1, Chapter 95, 1923 Session Laws of Alaska, as charged in Count 3 of the indictment on file herein; the defendant is present in court and represented by H. L. Faulkner, its attorney, A. G. Shoup appearing for the United States; the defendant is asked if there is any reason why sentence should not now be imposed, to which no good or sufficient reason is offered, and the Court being fully advised in the premises

DOES HEREBY CONSIDER, ADJUDGE AND DECREE that it is the judgment of the Court that the said defendant Auk Bay Salmon

Canning Company, a corporation, is guilty of the crime of unlawful fishing as charged in Count 2 of said indictment and guilty of the crime of unlawful fishing as charged in Count 3 of said indictment; and it is the sentence of the Court that said defendant be fined the sum of Two Hundred Dollars on Count 2 of said indictment and be fined the sum of Two Hundred Dollars on Count 3 of [9] said indictment and that it pay the costs of this action.

Time for sentence having heretofore been waived.

Exception allowed.

Done in open court this 21st day of April, 1924.

THOS. M. REED,
Judge.

Filed in the District Court, Territory of Alaska, First Division. Apr. 21, 1924. John H. Dunn, Clerk. By W. B. King, Deputy.

Entered Court Journal No. 1, page 277. [10]

In the District Court for the Territory of Alaska, Division Number One, at Ketchikan.

No. 870–KB.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE AUK BAY SALMON CANNING CO.,
Defendant.

BILL OF EXCEPTIONS.

BE IT REMEMBERED That the above-entitled cause came on duly and regularly to be tried at Ketchikan, Alaska, on Monday, the 21st day of April, 1924, before the Honorable Thomas M. Reed, Judge of said court, and a jury.

The plaintiff was represented by United States Attorney A. G. Shoup and the defendant was represented by Mr. H. L. Faulkner.

A jury having been impaneled, opening statement was made to the Court and jury by Mr. Shoup on behalf of the plaintiff, the defendant, by its counsel, waiving the making of a statement.

Whereupon the following proceedings were had and done, to wit: [11]

Mr. FAULKNER.—Now, if the Court please, before any testimony is introduced or any questions are asked of the witness, I would like at this time to object to the introduction of any testimony in this case upon the ground that the Legislature of the Territory had no authority to pass Chapter 95 of the Session Laws of Alaska, 1923, under which this indictment is brought, and to urge the same grounds as urged in the motion to quash and the demurrer.

The COURT.—Objection overruled; exception allowed.

TESTIMONY OF M. J. O'CONNOR, FOR PLAINTIFF.

M. J. O'CONNOR, called as a witness on behalf of the plaintiff, having been first duly sworn to tell the truth, testified as follows:

Direct Examination by Mr. SHOUP.

Q. Please state your name and official position.

A. M. J. O'Connor; warden Bureau of Fisheries.

Q. What is your territory or your station?

A. My territory is from Cape Fanshaw to Cape Spencer, in the northern part of this district.

Q. In Alaska? A. In Alaska.

Q. Are you acquainted with the Auk Bay Salmon Company, a corporation? A. Yes, sir.

Q. What business are they engaged in?

A. Canning salmon.

Q. Where? A. At Auk Bay.

Q. Where is Auk Bay?

A. Auk Bay is about twelve or thirteen miles north of Juneau.

Q. First Division, Territory of Alaska?

A. First Division, Territory of Alaska. [12]

Q. Now, I will ask you whether or not Auk Bay is between 57 and 60 deg. of north latitude and east of the 139 meridian of north longitude? A. It is.

Q. Are you acquainted with the Auk Bay Salmon Company's trap on Chatham Straits, northwest from Parker Point, on the west side of Admiralty Island, said fish-trap bearing territorial license No. 23–284? A. Yes, sir.

(Testimony of M. J. O'Connor.)

Q. I will ask you whether you visited that trap on the eleventh day of August, 1923?

A. Yes, sir.

Q. Did you make any notation as to whether or not that trap at that time was fishing?

A. Yes, sir.

Q. Who owns that trap, do you know?

A. The Auk Bay Canning Co.

Q. Who operates it?

A. The Auk Bay Canning Company.

Q. What did you find with reference to that trap on the 11th day of August, 1923?

A. I found the trap was set for fishing. There was about 300 salmon in the pot and about 10,000 in the spiller. There were about that, more or less, I estimated.

Q. The trap was fishing at that time? A. Yes.

Q. Was anybody there? A. A watchman.

Q. By whom was that watchman employed?

A. The Auk Bay Canning Company. [13]

The COURT.—The Auk Bay Canning Co. or Salmon Company?

The WITNESS.—Salmon Company.

Q. Is that trap east of the 139th meridian of west longitude, between 57 north latitude and 60 north latitude? A. Yes, sir.

Q. Do you know the Auk Bay Salmon Company's trap on Lynn Canal, near Point Retreat, on the west side of Mansfield Peninsula bearing territorial license No. 23-393? A. Yes, sir.

Q. I will ask you if you visited that trap.

(Testimony of M. J. O'Connor.)

A. On August 15th.

Q. On the 15th of August, 1923? A. Yes, sir.

The COURT.—Who is the owner of that trap?

The WITNESS.—The Auk Bay Salmon Company.

The COURT.—The Auk Bay Salmon Company?

The WITNESS.—The same company that owns the other trap.

The COURT.—What is the name of the company that owned the other trap?

The WITNESS.—The Auk Bay Salmon—let's see—the Auk Bay Salmon Canning Co.

Q. And the Auk Bay Salmon Canning Company is the company you had reference to?

A. In my previous testimony; yes.

Q. And has the cannery also?

A. The same cannery.

Q. When you visited the trap on Point Retreat the 15th of August, the trap you have just mentioned, what did you find there?

A. The scow had just been in and lifted the trap—brailed it. [14]

Q. Whose scow?

A. The Auk Bay Salmon Canning Company's scow.

Q. Was the trap still fishing when you left there after it was lifted?

A. The trap was set for fishing, but there was no fish except a few in the spiller. There was none seen in the pot.

Q. It was set? A. It was set for fish; yes.

(Testimony of M. J. O'Connor.)

Q. Was anybody in charge of it?

A. The watchman was on shore. He didn't come out.

Q. There was a watchman there? A. Yes.

Q. But he didn't come out? A. No.

Q. By whom was he employed?

A. He was employed by the Auk Bay Salmon Canning Co.

Q. Captain, I'll ask you if you know whether that company is incorporated. Just answer yes or no.

A. I am not sure. I couldn't say.

Q. That trap in Lynn Canal is in the Territory of Alaska, east of the 139th meridian of west longitude and between the 57th degree of north latitude and 60th degree north latitude? A. Yes, sir.

Q. One other question about this trap that you testify to as having fished on the eleventh of August and 15th of August, were those fish being caught for commercial purposes? A. Yes, sir.

Q. How do you know?

A. Well, they were taken to the cannery and canned and shipped below. [15]

Q. And they were not catching them with seines?

A. No.

Q. Or by trolling? A. No; no, sir.

Q. And you know of your own knowledge that they were fishing for commercial purposes?

A. Yes, sir.

Mr. SHOUP.—That's all.

Mr. FAULKNER.—That's all.

TESTIMONY OF H. L. FAULKNER, FOR PLAINTIFF.

H. L. FAULKNER, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. SHOUP.

Q. Please state your name and profession.

A. H. L. Faulkner, attorney-at-law.

Q. You are acquainted with the Auk Bay Salmon Canning Company? A. I am.

Q. Are you one of the attorneys for that corporation? A. I'm their attorney; yes.

Q. Will you state to the Court and jury how that corporation is organized, under the laws of what State?

A. The corporation is organized under the laws of the State of Washington.

Q. And are they duly domesticated and authorized to do business in the Territory of Alaska?

A. Yes, sir.

Q. And their cannery is where?

A. The cannery is at Auk Bay, about 12 or 14 miles north of Juneau. [16]

Q. Are they engaged in commercial salmon fishing? A. Yes, sir.

Mr. SHOUP.—That's all.

TESTIMONY OF H. R. THOMPSON, FOR PLAINTIFF.

H. R. THOMPSON, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. SHOUP.

Q. Please state your name and residence.

A. H. R. Thompson, Ketchikan, Alaska.

Q. What experience, if any, have you had in relation to commercial fishing by trollers?

A. I have had a great deal. I have bought fish from trollers for the last ten, fifteen years.

Q. Have you ever been out on the trolling grounds and are you familiar with how the business is carried on? A. Yes, sir.

Q. Now, state from your knowledge what seasons of the year commercial fishing by trollers is carried on in that part of Alaska between the 57th degree of north latitude and 60th degree of north latitude and east of the 139 meridian of west longitude, in the Territory of Alaska.

A. I'm not exactly familiar with those latitudes and longitudes, but I suppose it takes in southeastern Alaska.

Q. That takes in all of southeastern Alaska. The line goes through at about Sitka, three miles south of Sitka, or so.

A. Commercial trolling is carried on now during the whole year. It's only within the last few years that they have made an all-year-around business of trol-

(Testimony of H. R. Thompson.)

ling. It used to be considered a seasonable business. They would generally start [17] in the spring and troll right through summer until about October, but the last few years they have made a commercial thing of it. They troll now during the summer and winter, spring and fall.

Q. What species of salmon is caught by trollers for commercial purposes?

A. King salmon and cohoes.

Q. Are those the only species they catch?

A. Practically; yes.

Q. Now, are those salmon, king salmon and cohoes, when caught by trollers, canned or shipped fresh?

A. All the king salmon are either shipped fresh or mild-cured. I think there's a few canneries that can a few kings.

Q. Such salmon, when they are caught by trollers, are they on the feeding-grounds or are they on their way to the spawning beds?

A. They are caught on the feeding grounds.

Q. What species of salmon are packed generally by the canneries in this part of the Territory?

A. The canneries generally can the cheaper and smaller salmon—the sockeye and the humpback and dog salmon.

Q. Are those salmon fished for commercially by trollers? A. No.

Q. Now, I will ask you whether or not those salmon that you mentioned, the kind that are canned, are they on the feeding grounds or are they

on the way to the spawning ground when caught by the canneries?

A. They're on the way to the spawning grounds.

Mr. SHOUP.—That's all. [18]

Whereupon the plaintiff rested.

Mr. FAULKNER.—At this time the defendant moves the Court to dismiss the indictment on the ground that the law under which the indictment has been brought is void; that the Territorial Legislature had no authority to pass chapter 95 of the Session Laws of 1923; that the purported law under which the indictment was brought is contrary to the provisions of the organic act of the Territory in that it alters, amends and modifies the fish laws of the United States.

The COURT.—The motion is denied.

Mr. FAULKNER.—We have no testimony and we now move the court to instruct the jury to find the defendant not guilty upon the same ground as stated in the motion to dismiss the indictment.

The COURT.—Motion is denied.

Mr. FAULKNER.—If the Court please, I ask an exception to the court's rulings on both of the motions.

The COURT.—You may take an exception.

The defendant here rested.

Whereupon the Court instructed the jury as follows:

INSTRUCTIONS OF COURT TO THE JURY.

Ladies and Gentlemen of the Jury:

This case is brought under an indictment found by the grand jury here last fall, in which they indicted the Auk Bay Salmon Canning Company for fishing in violation of an act of the Legislature passed and approved May 4, 1923. This act provides that it shall be unlawful to take or fish for salmon for commercial purposes, except by trollers, in the waters of Alaska between the 57th and 60th degrees of north latitude and east of the 139 meridian of west longitude, from the 10th day of August to the first day of September in each year. This act therefore provides for a close season for fishing for salmon [19] for commercial purposes, except by means of trolling, in the waters of Alaska, between the 57th degree of north latitude and the 60th degree of north latitude and east of the 139 meridian of west longitude.

Now the indictment charges under this act, that the defendant, the Auk Bay Salmon Canning Company, on the 11th day of August, 1923, in the waters of Chatham Straits, northwest from Parker Point, on the west side of Admiralty Island, did wilfully and unlawfully fish for salmon, for commercial purposes by means of a fish-trap bearing territorial license No. 23–284, then and there located as aforesaid; that is, on Chatham Straits, northwest from Parker Point and east of the 139 meridian of west longitude and between the 57 degree of north latitude and the 60th degree of north latitude.

Now, this case is a criminal action, and you must

be satisfied from the evidence, beyond a reasonable doubt, that the defendant did so fish for commercial purposes by means other than by trolling, before you can find the defendant guilty.

The second count of the indictment charges the defendant with fishing between the tenth day of August and the 20th day of September—that is on August 15th—in the waters of Lynn Canal, at Point Retreat, on the north side of Mansfield Peninsula, for commercial purposes, by means of a fish-trap, territorial license No. 23–393, located on the waters of Lynn Canal, at Point Retreat, between the 57th degree of north latitude and the 60th degree of north latitude and east of the 139 meridian.

If you find from the evidence, beyond a reasonable doubt, that the defendant did so fish on the 15th day of August, for commercial purposes, by means of a fish-trap, in the waters of Alaska between the latitudes named, then it would be your duty [20] to find the defendant guilty on the third count.

The first count of the indictment has been ruled out, a demurrer to that count having been sustained because the count does not charge the defendant with fishing between the tenth day of August and the first day of September, 1923; so you will direct your attention to the second and third counts of the indictment only.

If you find that the defendant fished by means of a fish-trap at the points charged in the indictment and as charged in the indictment, between the 57th

degree and the 60th degree of north latitude and east of the 139th meridian of west longitude, it will be your duty to find the defendant guilty as charged in the indictment.

You will be handed one form of verdict. You will find that this verdict directs the jury to pass upon each count separately. When you have agreed on a verdict, you will have it signed by your foreman and returned into open court in the presence of you all.

Mr. FAULKNER.—If the Court please, I want to take an exception for the purpose of the record. The defendant at this time excepts to the instruction of the court to the jury to the effect that if they find from the evidence that the defendant was fishing by means of a fish-trap, for commercial purposes, between the 57th degree of north latitude and the 60th degree of north latitude and east of the 139 meridian of west longitude, between August 10th and September 1, 1923, as charged in the second and third counts of the indictment, they must find the defendant guilty, the objection being based upon the same grounds heretofore advanced—that the Territorial Legislature had no power to pass the alleged law under which the indictment was found.

Whereupon the jury retired to deliberate on a verdict. [21]

In the District Court for the Territory of Alaska, Division Number One, at Ketchikan.

No. 870–KB.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE AUK BAY SALMON CANNING CO.,
Defendant.

JUDGE'S CERTIFICATE TO BILL OF EXCEPTIONS.

I hereby certify that I am the Judge by and before whom the above-entitled cause was tried and that the foregoing bill of exceptions is a full, true and correct account and transcript of the evidence and proceedings had therein, and that it contains the evidence and all the evidence heard or considered at said trial.

I also certify that the said bill of exceptions was duly presented and filed within the time allowed by law and the rules of this court.

Wherefore, said bill of exceptions being true and correct, I do now, within the time allowed by law and the rules of this Court, allow and settle the same, and order it to be filed and to become a part of the records of this cause.

Dated at Ketchikan, Alaska, this 23d day of April, 1924.

THOS. M. REED,
District Judge.

Entered Court Journal No. 1, page 288. [22]

In the District Court for the Territory of Alaska, Division Number One, at Ketchikan.

No. 870–KB.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE AUK BAY SALMON CANNING CO.,
Defendant.

CERTIFICATE OF REPORTER TO TRANSCRIPT OF RECORD.

I, George W. Folta, do hereby certify that I am the official reporter for the United States District Court for the First Judicial Division of the Territory of Alaska, and that as such reporter I reported the testimony taken and proceedings had on the trial of the above-entitled cause and transcribed the same into typewriting and that the above and foregoing is a true and correct transcript af all of such testimony and proceedings.

Dated this 23d day of April, 1924.

G. W. FOLTA,
U. S. Court Reporter.

Filed in the District Court, Territory of Alaska, First Division. Apr. 23, 1924. John H. Dunn, Clerk. By W. B. King, Deputy. [23]

In the District Court for the District of Alaska, Division Number One, at Ketchikan.

No. 870–KB.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AUK BAY SALMON CANNING COMPANY, a Corporation,

Defendant.

ASSIGNMENTS OF ERROR.

Comes now the defendant above named, and files the following assignments of error upon which it will rely in the prosecution of the writ of error in the above-entitled cause from the judgment and proceedings had by this Honorable Court, which said judgment was signed and entered in the above-entitled court on the 21st day of April, 1924.

I.

The District Court for the District of Alaska erred in denying and refusing to grant defendant's motion to quash the indictment herein.

II.

The District Court erred in overruling the demurrer interposed by the defendant and appellant to the indictment.

III.

The Court erred in overruling the objection of

the defendant to the introduction of any evidence upon the trial of this cause.

IV.

The Court erred in overruling defendant's motion made at the close of plaintiff's evidence to dismiss the indictment and discharge the defendant upon the grounds set forth in said motion.

V.

The Court erred in refusing to grant defendant's motion for an instructed verdict of "not guilty" made at the close of all the evidence in the case upon the grounds set forth in said motion. [24]

VI.

The Court erred in instructing the jury that if they found that the defendant did willfully and unlawfully fish for salmon for commercial purposes by means of a fish-trap between August 10th and September 1st, 1923, between the 57th degree of north latitude and the 60th degree of north latitude and east of the 139th meridian of west longitude in the waters of Alaska, as charged in the indictment, then it would be their duty to find a verdict of "guilty."

VII.

The Court erred in entering judgment herein against the defendant.

And for said errors and others manifest of record, defendant prays that the judgment herein be reversed and the cause remanded.

Dated at Ketchikan, Alaska, the 23d day of April, 1924.

H. L. FAULKNER,
Attorney for Defendant.

Copy of the foregoing and within assignments of error received this 23d day of April, 1924, and service thereof admitted said day.

LESTER O. GORE,
Asst. U. S. Attorney.

Filed in the District Court, Territory of Alaska, First Division. Apr. 23, 1924. John H. Dunn, Clerk. By W. B. King, Deputy. [25]

In the District Court for the District of Alaska, Division Number One, at Ketchikan.

No. 870–KB.

UNITED STATES OF AMERICA

vs.

AUK BAY SALMON CANNING COMPANY, a Corporation,

Defendant.

PETITION FOR WRIT OF ERROR.

To the Honorable THOMAS M. REED, Judge of the Above-entitled Court:

The above-named defendant, Auk Bay Salmon Canning Company, a corporation, feeling itself aggrieved by the verdict of the jury rendered herein on April 21st, 1924, and the judgment and sentence

thereon rendered in this court on the 21st day af April, 1924, whereby the defendant Auk Bay Salmon Canning Company, was adjudged guilty of the crime of unlawful fishing in violation of section 1, Chapter 95 of the Session Laws of Alaska, 1923, and sentenced the 21st day of April, 1924, by the Judge of this court to pay a fine of $400.00 and costs.

Comes now the defendant and petitions this Honorable Court for a writ of error allowing said defendant to prosecute a writ of error in and to the United States Circuit Court of Appeals for the Ninth Circuit pursuant to the law in such cases provided; also that an order be made herein staying the proceedings and execution in such case until further order of the United States Circuit Court of Appeals, and pending the prosecution of said writ of error.

AUK BAY SALMON CANNING COMPANY, a Corporation.

By H. L. FAULKNER,
Its Agent and Attorney.
H. L. FAULKNER,
Attorney for Defendant.

Service admitted April 23d, 1924.

LESTER O. GORE,
Asst. U. S. Attorney.

Filed in the District Court, Territory of Alaska, First Division. April 23, 1924. John H. Dunn, Clerk. By W. B. King, Deputy. [26]

In the District Court for the District of Alaska, Division Number One, at Ketchikan.

No. 870–KB.

UNITED STATES OF AMERICA

vs.

AUK BAY SALMON CANNING COMPANY, a Corporation,

Defendant.

ORDER ALLOWING WRIT OF ERROR AND FIXING SUPERSEDEAS BOND.

This cause coming on to be heard in open court this 23d day of April, 1924, and the Court having examined the petition for writ of error herein, and having heard counsel for the United States and for the defendant,

IT IS ORDERED that the writ of error be allowed in this case, and the amount of supersedeas bond to be filed herein be fixed at the sum of $1000.00.

Done in open court this 23d day of April, 1924.

THOS. M. REED,

Judge.

Copy received April 23d, 1924.

LESTER O. GORE,

Asst. U. S. Attorney.

Filed in the District Court, Territory of Alaska,

First Division. Apr. 23, 1924. John H. Dunn, Clerk. By W. B. King, Deputy.

Entered Court Journal No. 1, page 287. [27]

In the District Court for the District of Alaska, Division Number One, at Ketchikan.

No. 870–KB.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AUK BAY SALMON CANNING COMPANY, a Corporation,

Defendant.

BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS, That we, Auk Bay Salmon Canning Company, the above-named defendant, principal, and J. R. Heckman, and W. A. Bryant, all of Ketchikan, Alaska, as sureties, are held and firmly bound unto the United States of America in the penal sum of $1000.00, for which payment, well and truly to be made, we bind ourselves and each of us, our successors, heirs, executors, administrators and assigns jointly and severally firmly by these presents.

Signed and sealed at Ketchikan, Alaska, April 23d, 1924.

The condition of the above obligation is such that whereas the above-named principal and de-

fendant, Auk Bay Salmon Canning Company, a corporation, is about to sue out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the above-entitled court rendered in the District Court of the District of Alaska at Ketchikan, Alaska, on April 21st, 1924, and entered and made herein on the 21st day of April, 1924, whereby and by the terms of which the said defendant Auk Bay Salmon Canning Company, a corporation, was sentenced to pay a fine of $400.00, for the crime mentioned in said judgment and sentence.

NOW, THEREFORE, the condition of this obligation is such that if the said defendant, Auk Bay Salmon Canning Company, a corporation, shall prosecute said writ of error to effect, and answer all costs and damages, if it [28] shall fail to make good its plea, and shall at all times render itself amenable to the orders and process of this court or the United States Circuit Court of Appeals for the Ninth Circuit, and render itself in execution if the judgment of this court is affirmed, or any judgment of this court in said proceedings, or said Appellate Court, or any court, then this obligation shall be void; otherwise to remain in full force and effect.

AUK BAY SALMON CANNING COMPANY, a Corporation.

By H. L. FAULKNER,
Its Agent and Attorney, Principal.

J. R. HECKMAN,
W. A. BRYANT,
Sureties.

Taken and acknowledged before me this 23d day of April, 1924.

[Seal] JOHN H. DUNN,
Clerk of District Court, Dist. of Alaska, Division No. 1.

United States of America,
Territory of Alaska,—ss.

We, J. R. Heckman and W. A. Bryant, being first severally duly sworn, each for himself and not one for the other, depose and say: That we are sureties on the foregoing bond and residents of the First Judicial Division, District of Alaska; and not counsellors at law nor attorneys, marshals, deputy marshals, clerks of any court, no other officers of any court; that we are each over the age of 21 years and worth the sum of $1000.00 each, over and above all our just debts and liabilities and exclusive of property exempt from execution.

J. R. HECKMAN.
W. A. BRYANT.

Subscribed and sworn to before me at Ketchikan, First Judicial Division, [29] District of Alaska, this 23d day of April, 1924.

[Seal] JOHN H. DUNN,
Clerk of District Court, Dist. of Alaska, Division No. 1.

Approved this 23d day of April, 1924, and stay of execution granted for a period of 60 days.

THOS. M. REED,
Judge.

Copy received this 23d day of April, 1924.
LESTER O. GORE,
Asst. U. S. Attorney.

Filed in the District Court, Territory of Alaska, First Division. Apr. 23, 1924. John H. Dunn, Clerk. By W. B. King, Deputy. [30]

In the District Court for the District of Alaska, Division Number One, at Ketchikan.

No. 870–KB.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

AUK BAY SALMON CANNING COMPANY, a Corporation,
Defendant.

WRIT OF ERROR.

The President of the United States, to the Honorable THOMAS M. REED, Judge of the District Court for the District of Alaska, Division Number One at Ketchikan, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea in said District Court before you, between the United States of America and Auk Bay Salmon Canning Company, a corporation, manifest error hath happened to the great prejudice and damage of the defendant, Auk Bay Salmon Canning Company, a

corporation, as is stated and appears in the petition herein.

We, being willing that error, if any hath happened, should be duly corrected and full and speedy justice be done to the parties in this behalf, do command you, if judgment be therein given that then, under your seal, distinctly and openly you send the record and the proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, together with this writ, so that you have the same before the court on or before thirty days from the date hereof; that the record and proceedings aforesaid being inspected, the Circuit Court of Appeals may cause further to be done therein to correct those errors what of right and according to the laws and customs [31] of the United States ought to be done or should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, and the seal of the District Court of Alaska, Division Number One, affixed at Ketchikan this 23d day of April, 1924.

Allowed: THOS. M. REED,
Judge.

Copy received and service admitted this April 23, 1924.

LESTER O. GORE,
Asst. U. S. Attorney.

Filed in the District Court, Territory of Alaska, First Division. Apr. 23, 1924. John H. Dunn, Clerk. By W. B. King, Deputy. [32]

In the District Court for the District of Alaska, Division Number One, at Ketchikan.

No. 870–KB.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AUK BAY SALMON CANNING COMPANY, a Corporation,

Defendant.

CITATION ON WRIT OF ERROR.

United States of America,—ss.

The President of the United States of America, to A. G. Shoup, United States Attorney for the First Division, District of Alaska, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the District Court for the District of Alaska, Division No. One, at Ketchikan, Alaska, wherein the Auk Bay Salmon Canning Company is plaintiff in error, and the United States is defendant in error, then and there to show cause,

if any there be, why the said judgment in said case, and in said writ of error mentioned should not be corrected and speedy justice done in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 23d day of April, 1924.

THOS. M. REED,
Judge.

Service of foregoing citation admitted this 23 day of April 1924.

LESTER O. GORE,
Asst. U. S. Attorney.

Filed in the District Court, Territory of Alaska, First Division. Apr. 23, 1924. John H. Dunn, Clerk. By W. B. King, Deputy. [33]

In the District Court for the District of Alaska, Division Number One, at Ketchikan.

No. 870–KB.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

AUK BAY SALMON CANNING COMPANY, a Corporation,
Defendant.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the District Court, Ketchikan, Alaska.

You will please make up a transcript of the record

in the above-entitled cause, and include therein the following papers, to wit:

1. Indictment.
2. Motion to quash indictment.
3. Demurrer.
4. Order overruling motion to quash and demurrer.
5. Bill of exceptions.
6. Verdict.
7. Judgment.
8. Assignments of error.
9. Petition for writ of error.
10. Order allowing writ of error.
11. Bond on writ of error.
12. Writ of error.
13. Citation on writ of error.
14. This praecipe.

—said transcript to be prepared in accordance with the rules of the United States Circuit Court of Appeals for the Ninth Circuit; and please [34] forward the same to the Clerk of the said Circuit Court of Appeals for the Ninth Circuit in accordance with said rules.

Dated at Ketchikan, Alaska, April 23, 1924.

R. E. ROBERTSON,
H. L. FAULKNER,
Attorneys for Defendant.

Filed in the District Court, Territory of Alaska, First Division. Apr. 23, 1924. John H. Dunn, Clerk. By W. B. King, Deputy. [35]

In the District Court for the Territory of Alaska, Division Number One, at Ketchikan.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Territory of Alaska,
Division Number One,—ss.

I, John H. Dunn, Clerk of the District Court for the Territory of Alaska, Division No. One, hereby certify that the foregoing and hereto attached 35 pages of typewritten matter, numbered "one" to "thirty-five," both inclusive, constitute a full, true and complete copy, and the whole thereof, of the record, in accordance with the praecipe of the plaintiff in error (defendant) on file herein, and made a part thereof, in the cause wherein the Auk Bay Salmon Canning Company, a corporation, is plaintiff in error (defendant), and the United States of America is defendant in error (plaintiff), No. 870–KB, 1610–B, as the same appears of record and on file in my office, and that the said record is by virtue of a writ of error and citation issued in this cause, and the return thereof, in accordance therewith.

I do further certify that the transcript was prepared by me in my office, and that the cost of preparation, examination and certificate, amounting to Thirteen and 50/100 Dollars ($13.50), has been paid to me by counsel for plaintiff in error (defendant).

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the above-entitled court, this 24th day of April, 1924.

[Seal] JOHN H. DUNN,
Clerk.

[Endorsed]: No. 4245. United States Circuit Court of Appeals for the Ninth Circuit. Auk Bay Salmon Canning Company, a Corporation, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Alaska, Division No. 1.

Filed April 30, 1924.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 4245

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AUK BAY SALMON CANNING COMPANY
(a corporation),
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

CHICKERING & GREGORY,
KERR, MCCORD & IVEY,
H. L. FAULKNER,
R. E. ROBERTSON,
Attorneys for Plaintiff in Error.

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No. 4245

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AUK BAY SALMON CANNING COMPANY
(a corporation),
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This is a writ of error to the District Court for the District of Alaska, Division No. 1, to review a judgment of that court by which the plaintiff in error was convicted under two counts (Record pages 3 and 4) of a violation of C. 95 of the Session Laws of Alaska for the year 1923. The law mentioned is as follows:

"Chapter 95,
AN ACT

To supplement the fish laws of the United States applicable to Alaska; to conserve the salmon supply of Alaska; to provide for closed seasons for salmon fishing, and for other purposes, and declaring an emergency.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. That it shall be unlawful to take or fish for salmon for commercial purposes, except by trollers, in the waters of Alaska between the 57th and 60th degrees of north latitude and east of the 139th meridian west longitude from the tenth day of August to the first day of September in each year.

Section 2. That it shall be unlawful to take or fish for salmon for commercial purposes, except by trollers, in the waters of Alaska south of the 57th degree of north latitude and east of 139th meridian from the 20th day of August to the 9th day of September in each year.

Section 3. That any person, firm or corporation violating any of the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof for each and every offense be punished by a fine of not less than fifty dollars ($50.00) nor more than one thousand dollars ($1,000.00), or by imprisonment in jail for not less than ten days nor more than one year, or by both such fine and imprisonment, in the discretion of the court.

Section 4. This act shall not be so construed as in anywise to alter, amend, modify or repeal any of the fish laws of the United States applicable to Alaska, or any act of Congress whatsoever relating to the fisheries of Alaska whether designed to regulate the same or passed for any other purpose whatsoever, but all such laws and acts of Congress shall be and remain in full force and effect. The purpose of this act is not to alter, amend, modify or repeal any of such laws, but to provide for further and *additional* regulation of the fisheries with a view of giving additional protection to the salmon and insuring a future supply thereof, and this act shall be construed so as to carry out the intention herein expressed and not otherwise.

Section 5. An emergency is hereby declared to exist and this act shall be in effect immediately upon its passage and approval.

Approved May 4, 1923."

The sole question in the case is the validity of this Statute the facts proved at the trial being sufficient to warrant a conviction if the Statute is valid.

Assignments of Error.

The record contains seven assignments of error appearing on pages 27 to 28 thereof. They all raise the same question, namely, the validity of the law in question and they may all be summarized as follows:

The District Court erred in holding that C. 95 of the Session Laws of Alaska for 1923 is valid.

Argument.

I.

THE LAW IS IN CONFLICT WITH THE ACT OF CONGRESS OF AUGUST 24, 1912, C. 387 (37 STATS. 512; 1 FED. STATS. ANN. 2ND ED. 251) AND IN PARTICULAR WITH SECTION 3 OF SAID ACT BECAUSE IT ALTERS, AMENDS, MODIFIES AND REPEALS THE FISH LAWS OF THE UNITED STATES APPLICABLE TO ALASKA.

(a) In General.

The section in question is as follows:

"Sec. 3. CONSTITUTION AND LAWS OF UNITED STATES EXTENDED.—That the Constitution of

the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States; that all the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by Act of Congress; that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the Legislature: *Provided, That the authority herein granted to the Legislature to alter, amend, modify and repeal laws in force in Alaska shall not extend to the customs, internal-revenue, postal, or other general laws of the United States or to the game, fish, and fur-seal laws and laws relating to fur-bearing animals of the United States applicable to Alaska,* or to the laws of the United States providing for taxes on business and trade, or to the act entitled 'An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the District of Alaska, and for other purposes,' approved January twenty-seventh, nineteen hundred and five, and the several acts amendatory thereof: Provided further, That this provision shall not operate to prevent the Legislature from imposing other and additional taxes or licenses. And the Legislature shall pass no law depriving the judges and officers of the District Court of Alaska of any authority, jurisdiction, or function exercised by like judges or officers of the District Courts of the United States."

In examining this section it seems quite apparent that Congress intended to reserve to itself without

the possibility of interference from the Territorial Legislature the whole subject of customs, internal revenue, postal, game, fish, fur-seal and other general laws relating to the Territory of Alaska. It seems hardly likely that Congress desired to permit any legislation by the Territorial Legislature with reference to customs, internal revenue, postal and such other general laws. The portion of the section relating to the fish laws applicable to Alaska is in the same sentence and in the same grammatical construction as the provision concerning customs, internal revenue and postal laws. The only reasonable construction to put upon the section would, therefore, seem to be that Congress considered the fish laws and the postal laws, for example, as falling in the same category so far as legislation by the Territorial Legislature is concerned. It also logically follows from the juxtaposition of these provisions that, if this law is valid, then the Alaskan Legislature is competent to change and add to the postal, customs and internal revenue laws of the United States. For example, the Legislature could require an additional postage stamp on all matter mailed in the Territory, place a high protective tariff upon goods which the general customs laws admit free, and could in general upset the whole scheme of congressional legislation with respect to such matters.

It is hardly conceivable that Congress intended any such result and it, therefore, is apparent that the whole field of legislation on these subjects, on

the fish law as well as the postal laws, was withdrawn from the jurisdiction of the Alaskan Legislature.

It may be noted in this connection that the Territorial Legislature of 1923 itself apparently believed that it had no power to regulate fisheries, and that regulation would have to come from Congress. This is shown by House Concurrent Resolution No. 12 (Session Laws Alaska 1923, p. 292). Section 5 of this resolution recites that "the laws governing the Alaska fisheries are inadequate and antiquated". Section 7 recites that the regulation of fisheries "even with the best of intentions can never be administered from Washington by officials personally unfamiliar with local conditions", and the last section says very significantly that the Legislature recognizes that the Territory "will never receive proper protection for her fisheries from the Federal Government, *and only asks the Congress of the United States for permission to prevent the extinction of her, at present, principal industry*". Then follows a form of bill which the Territorial Legislature petitions Congress to pass, and which places the entire control of fisheries in the Territory. The inference is obvious.

(b) It Has Been Decided by This Court that the Territorial Legislature is Without Power to Regulate Fisheries.

In the case of *Alaska Pacific Fisheries v. Alaska,* 236 Fed. 52; 149 C. C. A. 262, this court considered a law of Alaska which imposed certain excise taxes

upon fisheries, these taxes being in excess of those provided for in the Act of 1906 (which act is summarized in the next section of this brief). The question was the validity of these territorial taxes. They were upheld upon the sole ground that the taxing provisions of the Act of 1906 were separable from the regulatory features of that act; that the Territorial Legislature was, by the Organic Act, specifically authorized to impose additional excise taxes provided they were actually excise taxes and not regulatory measures disguised as taxes, and that hence, while the Territory had no power to *regulate* fisheries it could validly increase the taxes on fisheries. After summarizing the provisions of the Act of 1906, the court said:

> "* * * But when Congress, in 1912, conferred the legislative power which we have shown exists, *while it expressly withheld power to alter or amend laws pertaining to fish and other certain subjects and saved certain laws then in force,* it nevertheless unmistakably transferred power to the newly created legislative body to impose other and additional taxes and licenses; that is, power to impose taxes different from, and it might be additional to, those already in force when the Organic Act was approved. *And thus by the Organic Act those general provisions for the protection of the fish which we find in the Act of 1906 were kept in force without possibility of alteration, amendment, or repeal* by the Territorial Legislature, and the specific license tax provided by the Act of 1906 was kept in force, but with power transferred to the Legislature to impose,

if it should see fit, other and additional license taxes.

"We cannot agree that the portion of the Act of 1906 which provides for license fees and taxes is inseparable from the other provisions of that act. The protection and encouragement of fisheries was evidently one of the main purposes of the act, and the creation of revenue by the imposition of a license tax on the business of canning and manufacturing was another purpose. *Those portions of the act which have to do with the methods of carrying on fishing, and which prescribe the seasons when it may be carried on, and the waters within which it may be carried on, are preserved;* but the imposition of additional license taxes to be imposed for carrying on the business was a subject of a different character and, in the judgment of Congress, might properly be entrusted to the wisdom of the newly created legislative assembly * * *."

Furthermore, the United States Supreme Court has gone much further in this direction than it is necessary to go in the case at bar. In the case of *Ferris v. Higley,* 20 Wall. 375, 22 L. Ed. 383, the court considered the statute of the Territory of Utah which provided that the probate courts of the Territory should have general common law and chancery jurisdiction. The Organic Act of that Territory, after providing for a supreme court, district courts and probate courts, contained a provision that the district courts should have general original jurisdiction, and that the jurisdiction of the probate courts should be "as limited by law". The court recognized that Congress had intrusted

to the Territorial Legislature the matter of fixing the jurisdiction of the probate courts, but nevertheless held that the act extending their jurisdiction so as to include general original jurisdiction was void. The court said:

> "* * * We are of opinion that the one (the act) which we have been considering is inconsistent with the general scope and spirit of the act in defining the courts of the Territory, and in the distribution of judicial power amongst them, inconsistent with the nature and purpose of a probate court as authorized by that act, and inconsistent with the clause which confers upon the Supreme Court and District Courts general jurisdiction in chancery as well as at common law. *The fact that the judges of these latter courts are appointed by the Federal power, paid by that power—that other officers of these courts are appointed and paid in like manner—strongly repels the idea that Congress, in conferring on these courts all the powers of courts of general jurisdiction, both civil and criminal, intended to leave to the Territorial Legislature the power to practically evade or obstruct the exercise of those powers by conferring precisely the same jurisdiction on courts created and appointed by the Territory.*"

The foregoing case thus decides that where Congress has granted a certain jurisdiction to a particular court, it has impliedly forbidden the Territorial Legislature to grant similar jurisdiction to another court. In the case at bar the situation would be identical if Congress had merely passed the Act of 1906, and said nothing whatever in the Organic Act about the power of the Territory to

legislate with reference to fisheries. Under the holding of the case just cited, any regulation by the Territorial Legislature under such circumstances would be void. But to remove any possible doubt Congress has, in the case of Alaska, expressly forbidden any alteration, amendment, modification or repeal of the laws relating to fisheries. It seems too clear for serious dispute, under the doctrine of the Ferris case, that the territorial statute in question here must be declared void.

(c) Fish Laws in Force at the Time the Organic Act Was Adopted.

An examination of the fish laws in force at the time the Organic Act above quoted was adopted throws a good deal of light upon the matter. The most important of these fish laws are embodied in the Act of June 26, 1906, C. 3547 (34 Stats. 478; 1 Fed. Stats. Ann. 2nd Ed. 353 et seq.). *Section 1* of this act provides for a license tax upon the business of manufacturing fish products; *section 2* contains lengthy and detailed provisions for encouraging the operation of private fish hatcheries and an exemption from taxation in proportion to the fish hatched and liberated; *section 3* makes it unlawful to erect any structures at certain points in the waters of Alaska where such obstruction would prevent the ascent of salmon to the spawning grounds. The Secretary of Commerce is further given authority to remove any such unlawful obstructions; *section 4* makes it unlawful to operate

any fishing appliances across or within a certain distance of any salmon stream. It also makes it unlawful to operate a seine within one hundred yards of any other fishing appliance or to install a trap within a certain distance of any other fishing appliance; *section 5* provides that in certain waters of Alaska it shall be unlawful to fish except with rod, spear or gaff

> "from six o'clock post-meridian of Saturday of each week until six o'clock ante-meridian of the Monday following",

and also to fish at night in certain streams. It also provides

> "that throughout the weekly closed season herein prescribed the gate, mouth or tunnel of all stationary and floating traps shall be closed, etc.";

section 6 provides that the Secretary of Commerce may set aside any streams or lakes for spawning grounds in which fish may be limited or entirely prohibited. It also provides that the Secretary of Commerce may establish closed seasons or limit or prohibit fishing entirely for one year or more within a stream or within a certain distance of the mouth of the stream when in his judgment the number of salmon being taken from said stream is larger than its natural production. It likewise provides that such powers shall be exercised only after all persons interested have been given notice and a hearing, and further, that any order so made shall not be effective before the year after that in which it is

made. It further provides that such limitation shall not apply to persons who keep the streams in which they fish fully stocked by artificial means; *section 7* makes it unlawful to can salmon more than forty-eight hours after it has been caught; *section 8* makes it unlawful wantonly to waste or destroy salmon or other food fish; *section 9* makes it unlawful to misbrand any can of fish by misrepresenting its contents; *section 10* provides for "detailed annual reports" to the Secretary of Commerce covering all facts in connection with the operation of any salmon cannery or other fishing establishment; *section 11* provides

> "that the catching or killing, except with rod, spear or gaff of any fish of any kind or species whatsoever in any of the waters of Alaska over which the United States has jurisdiction, shall be subject to the provisions of this act, *and the Secretary of Commerce and Labor is hereby authorized to make and establish such rules and regulations not inconsistent with law as may be necessary to carry into effect the provisions of this act*";

section 12 provides for employees of the Secretary of Commerce to investigate and inspect fishing establishments; *section 13* provides penalties for violations of the act and for the forfeiture of apparatus used in violation of the act. The penalty is not exceeding $1,000 or imprisonment for not more than ninety days, or both, and also a further fine of not more than $250 per day for a violation of section 4; *section 14* provides for the venue of

actions; *section 15* repeals inconsistent laws and *section 16* provides for the taking effect of the act immediately.

(d) A Comparison of These Provisions with Those of the Act in Question Here Show a Clear Conflict.

A comparison of the law in question here and the foregoing act of Congress demonstrates that the Alaskan statute changes the law with respect to fishing in Alaska in at least the following respects:

(1) It creates a new classification separating those who fish for commercial purposes from those who fish for other purposes and then subdivides this classification into those who fish by trolling and those who fish in all other ways. Neither of these classifications appear anywhere in the Act of Congress;

(2) It prescribes a special rule for the taking of salmon whereas the Act of Congress by its express terms covers the taking of all fish (section 11);

(3) In lieu of a closed season from Saturday night until Monday morning for certain limited areas it substitutes a much longer closed season over a much greater area; in other words it repeals section 5;

(4) It makes it unlawful during the closed seasons provided for to fish with rod, spear or gaff, while section 5 expressly excepts such fishing from its operation;

(5) It provides for a closed season taking effect immediately upon the passage of the act without notice and without hearing over an area much greater than that authorized in section 6;

(6) It exercises by Act of the Legislature the power which by section 6 was expressly intrusted to the Secretary of Commerce;

(7) In place of a fine not exceeding $1,000 without a minimum or an imprisonment of not more than 90 days without a minimum, or both, it substitutes a fine of not less than $50 nor more than $1,000 or an imprisonment of not less than 10 days nor more than one year, or both; in other words the penalties for violation of the fishing regulations are very considerably increased;

(8) It makes it unlawful to fish during the closed seasons prescribed even in streams which are artificially restocked, notwithstanding the express direction of section 6 that no closed season regulation shall apply to such streams;

(9) It makes a regulation of fisheries whereas the Secretary of Commerce by section 11 is expressly given this power.

In other words the regulation prescribed by the Alaskan statute is much more burdensome than the Act of Congress, and is furthermore totally inconsistent with it. We submit that this very clearly constitutes a modification, alteration, amendment and repeal of the Act of Congress.

(e) Definition of the Terms "Alter", "Amend", "Modify" and "Repeal". They Include the Meaning "Add to".

It does not seem to us that there can be any serious doubt as to what the words "alter, amend, modify and repeal" mean. They would seem to be all inclusive and in fact are about as broad as could be hit upon. However, we submit the following definitions of the various terms:

ALTER. "To change the nature or form of; to change in some respect either partially or wholly; to change in form without destroying its identity; to change or modify the form or character of a thing without changing its identity; to cause to be different in some respect; to make a change in; to make different; to make a thing different from what it was; to make different without destroying the identity; to make some change in character, shape, condition, position, quantity, value, etc.; to make otherwise; to modify; to add to; to increase or diminish; to become different in some respects or to some extent; to vary in some degree; to vary in some degree without making the entire change."

2 *C. J.* 1165.

AMEND. "A word derived from the French word 'amender' and signifying 'to make better; to change; to change from bad to the better'; to alter, annul or remove that which is faulty and substitute that which will improve; to change in any way for the better; to correct; to correct faults; to cure an error; to cure defects; to free from error or deficiency; to improve; to rectify; to rectify mistakes and better the condition; to reform; to remove errors from; to remove what is erroneous, superfluous, faulty and the like; to repair; to revise; to substitute something in the place of what is removed; to supply deficiencies."

2 *C. J.* 1316.

MODIFY. "Change."

Lucas County Commissioners v. Fulton County Commissioners, 3 Ohio Dec. 159 (163).

"Change, vary, quality or reduce."

State v. Tucker, 36 Ore. 291; 61 Pac. 894 (897).

"Increase, reduce, change in any way or suspend."

Soule v. Soule, 4 Cal. App. 97; 87 Pac. 205.

"To change or alter the external qualities or incidents of anything; to vary; to alter; to give a new form, character, force or appearance."

Edwards v. Cooper, 168 Ind. 54; 79 N. E. 1047.

"The power to modify includes the power to amend."

Wiley v. Corporation of Bluffton, 111 Ind. 152; 12 N. E. 165 (168).

Repeal. "To recall or revoke."

Oakland Paving Co. v. Hilton, 69 Cal. 479; 11 Pac. 3 (6).

Jessee v. De Shong, (Tex.), 105 S. W. 1011.

"Annul, cancel, reverse, abolish."

City of St. Louis v. Kellman, 235 Mo. 687; 139 S. W. 443 (445);

Wilson v. People, 36 Colo. 418; 85 Pac. 187 (189).

Summing up the foregoing definitions it is apparent that the words used in this statute have

been given by the courts precisely the meaning which their common usage attaches to them. Taken as a whole it would seem too clear for argument that they prohibit the Territorial Legislature from adding to, subtracting from or in any way changing the various laws enumerated in the statute, including the fish laws. It may be said that the four words are merely synonyms, and mean nothing more than that the actual laws passed by Congress cannot be technically amended or repealed. It seems to us that just the reverse is true. The words "amend" and "repeal" have a technical meaning. If they alone were used it might well be argued that the Legislature could prescribe other rules for the various subjects mentioned in the Organic Act so long as it did not actually seek to amend or repeal, in the narrow technical sense, some act of Congress. It seems plain that the words "modify" and "alter" were inserted in the Organic Act for the precise purpose of preventing any such narrow construction.

We understand that the contention in this case is (and in fact it is expressly stated in section 4 of the act in question) that the purpose of the act is merely to *add* something to the regulations applicable to fisheries. This suggestion will be answered more fully a little later, but we call attention to it here and submit that it is merely begging the question. Under the definitions we have just quoted, and with the common meaning of

the words used in mind, it cannot be seriously urged that the so-called "additions" to the law do not constitute an alteration or modification of it. For example, it would hardly be seriously maintained that "adding" a provision for the payment of an attorney's fee did not constitute an alteration or modification of a promissory note.

(f) The Act of 26 June, 1906, Covers the Whole Field of Fisheries Regulation, and in Particular that of Closed Seasons. The Authorities Settle This Point, and Further Show that No "Additional" Regulations by the Territory Can Validly Be Set Up.

We have summarized the fish laws in force at the time the Organic Act was passed in as condensed form as possible. Even in this form, however, the summary occupies an appreciable amount of space, and even a cursory examination of the provisions of the act demonstrates that almost every conceivable detail of the regulation of fisheries was considered and legislated upon by Congress. In other words the act of Congress covers at considerable length and in quite minute detail the whole field. It covers in particular and with some care the matter of closed seasons. There are two sections (sections 5 and 6) referring to closed seasons. Those two sections provide when the closed seasons shall go into effect; where they shall be operative, and what persons they shall be applicable to. They provide for certain exceptions from their general operation; for notice and hearings; and in

fact set up all the machinery for detailed and comprehensive systems of closed seasons. It would seem obvious without argument that having carefully considered and treated the matter, Congress determined that the closed seasons therein provided for were all the closed seasons that it desired to establish. In short, Congress has entered the field and fully occupied it.

The preceding observations seem pertinent for the following reasons: It is a well settled rule that in the absence of legislation by a paramount sovereignty, an inferior legislative body may prescribe regulations; but when, and as soon as, the paramount sovereignty acts, then all right to regulate on the part of the inferior jurisdiction is suspended. The test in all of such cases is whether or not the paramount sovereignty has entered the particular field in question.

It may be assumed for the purposes of argument that in the absence of legislation by Congress the Territorial Legislature would be fully empowered to pass any fish law that it desired. It is also well settled that the power of Congress to legislate upon Territorial matters is paramount and practically unlimited even by the usual constitutional restrictions.

> *Late Corporation of the Church of Jesus Christ of Latter Day Saints v. United States,* 136 U. S. 1; 10 Sup. Ct. 792; 34 Law. Ed. 478;

Boyd v. Nebraska, 143 U. S. 135; 12 Sup. Ct. 375; 36 Law Ed. 103;
Board of Public Utility Commissioners v. Ynchausti & Co., 251 U. S. 401.

In view of these considerations, the various decisions of the United States Supreme Court with reference to the respective rights of Congress and of the states to legislate under the Commerce Clause of the Constitution are so closely analogous as to be directly in point.

In the first place it is clear as pointed out above that Congress has occupied and has intended to occupy the whole field of fishery regulations in Alaska. The following authorities go much further on this point than it is necessary to go in this case.

Adams Express Co. v. Croninger, 226 U. S. 491; 57 Law. Ed. 314; 33 Sup. Ct. 148.

This was a case arising under the Carmack Amendment to the Interstate Commerce Act. This amendment is quite short and provides in substance:

(a) For the issuance of a bill of lading;
(b) That the carrier issuing the bill of lading shall be liable to the holder thereof for any damage to or loss of property caused by it or any connecting carrier; and
(c) That the carrier shall not, by contract or regulation, exempt itself from this liability.

The state of Kentucky had a statute invalidating limitations of liability in bills of lading. The ex-

press company had issued a bill of lading at a certain rate based on a valuation of not more than $50.00. The question was whether or not the Kentucky statute could be allowed to operate in view of the Carmack Amendment. The Supreme Court held that it could not, saying:

> "That the legislation supersedes all the regulations and policies of a particular State upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely and there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the State upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the State ceased to exist. Northern Pacific Ry. v. State of Washington, 222 U. S. 370; Southern Railway v. Reid, 222 U. S. 424; Mondou v. Railroad, 223 U. S. 1."

The thing that is most striking about the foregoing case is that the Carmack Amendment is very much less detailed than the act in question in the case at bar; and further, that the Carmack Amendment did not touch the question of the valuation of shipments in any manner whatever. Yet the court held that the field was so completely occupied

by Congress that the State regulations were abrogated.

In *Missouri, Kansas & Texas Railroad v. Harriman,* 227 U. S. 657; 57 Law Ed. 490; 33 Sup. Ct. 397, the same rule was applied to a limitation contained in a bill of lading of the time within which suit could be brought. Such limitation was invalid under the applicable state statute, and there was no congressional legislation upon the particular subject.

In *Atchison & Topeka Ry. v. Harold,* 241 U. S. 371 (378); 60 Law. Ed. 1050; 36 Sup. Ct. 665, the court held that the Carmack Amendment abrogated the rule of law, existing in a state by judicial decision, making a carrier liable to innocent purchasers for a mistake in the bill of lading. In this case also there was no express congressional legislation on this particular point and the theory again was that all state rules as to bills of lading were set aside.

In *St. Louis Iron Mountain & Southern Ry. v. Edwards,* 227 U. S. 265; 57 Law. Ed. 506; 33 Sup. Ct. 262, the same rule was applied to a state statute requiring the carrier to give notice to the consignee of the arrival of the shipment within twenty-four hours after arrival.

It may be noted that in all of the foregoing cases the regulations established by the states were merely additional to, and not in terms inconsistent with, the congressional legislation. The following cases

specifically decide that the states have no power to add to or supplement the acts of Congress in such matters.

In *Prigg v. Pennsylvania,* 16 Peters. 536 (617), 10 L. Ed. 1060, the court had before it certain acts of the Pennsylvania Legislature with respect to escaped slaves. In disposing of the contention that the acts of the Pennsylvania Legislature were not inconsistent with the acts of Congress and were merely "additional", the court said:

> "* * * For, if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be, that the state legislatures have a right to interfere, and as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. *In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates, that it does not intend that there shall be any further legislation to act upon the subject-matter. Its silence as to what it does not do, is as expressive of what its intention is, as the direct provision made by it.* This doctrine was fully recognized by this court, in the case of Houston v. Moore, 5 Wheat. 1, 21-2; where it was expressly held, that where Congress have exercised a power over a particular subject given them by the Constitution, *it is not competent for state legislation to add to the provisions of Congress upon that subject; for that the will of Congress upon the whole subject is as clearly established by what it has not declared, as by what it has expressed.*"

Erie Railroad Co. v. New York, 233 U. S. 671 (680, 683); 58 Law Ed. 1149; 34 Sup. Ct. 756. The State of New York had passed a statute prohibiting the employment of railroad employees for more than eight consecutive hours in any twenty-four hour period. The Federal Hours of Service Act prohibited interstate carriers from permitting any employee to work more than nine consecutive hours. The Court of Appeals of New York sustained the state law on the ground that there was no conflict between it and the Act of Congress of March 4, 1907, saying:

> "The state has simply supplemented the action of the Federal authorities. It is the same as if Congress had enacted that the classes of employees named might be employed for nine hours or less and the state had fixed the lesser number which was left open by the Federal Statute. The form of the latter fixed the outside limit, but not expressly legalizing employment up to that limit fairly seems to have invited and to have left the subject open for supplemental state legislation if necessary."

The Supreme Court declined to follow this reasoning. The court said:

> "We realize the strength of these observations, but they put out of view, we think, the ground of decision of the cases, and, indeed, the necessary condition of the supremacy of the congressional power. It is not that there may be division of the field of regulation, but an exclusive occupation of it when Congress manifests a purpose to enter it."

In *Charleston & Carolina Railroad Co. v. Varnville Co.,* 237 U. S. 597 (604); 59 Law Ed. 1137; 35 Sup. Ct. 715, a state statute subjected the carrier to a penalty of $50 for failure to pay claims within 40 days. The court held that such a regulation was invalid under the Carmack Amendment as applied to insterstate commerce and said:

> "When Congress has taken the particular subject matter in hand, *coincidence is as ineffective as opposition and a state rule is not to be declared a help because it attempts to go further than Congress has seen fit to go.*"

In *Southern Railway Co. v. Railroad Commission,* 236 U. S. 439 (446); 59 Law. Ed. 661; 35 Sup. Ct. 309, the court considered a statute of Indiana which required railroad companies to place grab-irons and handholds on the sides *or* ends of every railroad car. The Federal Statute required handholds to be placed on both the sides *and* the ends of the cars. The question was whether or not the carrier was liable for the penalty prescribed by the Indiana Statute. The court held that it was not. The court said:

> "* * * But so far as it did legislate, the exclusive effect of the Safety Appliance Act did not relate merely to details of the statute and the penalties it imposed, but extended to the whole subject of equipping cars with appliances intended for the protection of employes. *The States thereafter could not legislate so as to require greater or less or different equipment; nor could they punish by imposing greater or less or different penalties* * * *."

In other words this was a case where the state statute was identical so far as it went with the Federal Statute, but was somewhat less stringent in its requirements. The court nevertheless held that it was inoperative.

Seaboard Air Line v. Horton, 233 U. S. 492 (507); 58 Law. Ed. 1062; 34 Sup. Ct. 635. In this case an employee of a railroad company was injured by a defective water gauge in a locomotive. The Congressional Safety Appliance Act was in force but made no mention of such appliances as the one involved in the case. The state court held that in view of this fact the rights of the employee were to be measured by a state statute abolishing the defense of assumption of risk. The Supreme Court held that on the contrary the effect of the lack of legislation was to relegate the employee to the common law rule and not to the rule of law prescribed by the state statute.

A similar ruling was made in *Toledo, St. Louis and Western Railroad Company v. Slavin,* 236 U. S. 454; 59 Law. Ed. 671; 35 Sup. Ct. 306.

In *St. Louis, Iron Mountain & Southern Ry. v. Hesterly,* 228 U. S. 702; 57 Law. Ed. 1031; 33 Sup. Ct. 703, the question was whether or not the state statute as to distribution of the proceeds of an action for wrongful death should be followed, or whether the rule provided by the Federal Employers' Liability Act was exclusive. The state court had held "that the act of Congress was only sup-

plementary and that the judgment could be upheld under the state law"; in other words that the remedy given by Congress was simply cumulative and that it did not determine the distribution in probate proceedings. The Supreme Court decided that the act of Congress was exclusive.

The substance of the foregoing authorities is that where Congress has entered a field, then any regulation whatsoever, *whether it be identical, additional or less* than the congressional regulation, is void and of no effect. In view of the situation as to the respective powers of Congress and the Territorial Legislature it seems to us that the cases are directly in point. In fact they are somewhat stronger than is necessary in the instant case because the Territory of Alaska is wholly within the power of Congress while the states involved in these cases are, of course, independent sovereignties. They likewise on their facts go a great deal further than is necessary in the case at bar.

(g) The Rule is the Same Where Congress, as in the Act of 26 June, 1906, has Empowered an Executive or Administrative Body to Promulgate Regulations.

In addition to the foregoing we call the court's particular attention to section 11 of the fisheries law above referred to, wherein it is provided that the Secretary of Commerce may make such rules and regulations as may be necessary to carry into effect the provisions of the act. It is a fact, and matter of public record and common knowledge, that

the Secretary of Commerce has frequently exercised this power, and that the Department of Commerce has been actively engaged in regulating and inspecting the fisheries of Alaska. Various fishing reservations have been put into effect by proclamation of the President,[1] and in fact the Federal Government has at all times actively exercised the power granted in this act.[2] In this connection the decision in *Actiesselskabet Ingrid, et al. v. The Central Railroad Co. of New Jersey,* 216 Fed. 72 (82); 132 C. C. A. 316 is particularly pertinent. In that case a cargo of dynamite had exploded while on a pier in Jersey City. It was at the time waiting for transfer to a vessel bound for a foreign country. A statute of New Jersey and certain municipal regulations of Jersey City provided for the manner of handling and storing of explosives, and it was contended that these regulations had been violated. The Interstate Commerce Act had authorized the Interstate Commerce Commission to formulate regulations for the transportation of explosives, and the Interstate Commerce Commission had done so. There is nothing in the case to show that the regulations were in any manner in conflict. The Circuit Court of Appeals nevertheless held that the state and municipal regulations were of not effect, saying:

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(1) By executive order dated 3 November, 1922, President Harding created the Southwestern Alaska Fisheries Reservation, and on December 16, 1922, Secretary Hoover issued certain regulations under this order.

(2) On December 30, 1921, the Secretary of Commerce, by an order which is still in effect, promulgated certain closed season regulations under Section 11 of the Act.

> "* * * We have no doubt that the dynamite in question was subject exclusively to the regulations of the Interstate Commerce Commission. When Congress has legislated upon a subject within its constitutional control, and has manifested its intention to deal therewith in full, the authority of local jurisdiction is necessarily excluded. See Northern Pacific Railway Co. v. State of Washington, 222 U. S. 370, 378, 32 Sup. Ct. 160, 56 L. Ed. 237."

In other words the case holds that where Congress has authorized an administrative or executive federal body to promulgate regulations, then any state regulation is abrogated. This is precisely the situation in the case at bar.

(h) This Court Has Decided that an "Additional" Regulation is Invalid.

We also call the court's attention to its decision in the case of *Betsch v. Umphrey,* 270 Fed. 45 (C. C. A. 9th). This case passed upon a law of the Territory of Alaska providing that failure to file an affidavit setting out that the assessment work on a mining claim had been done should constitute an abandonment of the claim. The applicable Federal Statute provided for the filing of a similar affidavit, but made the test of abandonment whether or not the work had been done and not whether or not the affidavit was filed. This court held that the Alaska Statute was invalid. The court said:

> "* * * To legislate thus was to transcend the authority conferred by the Enabling Act, was to interfere with the right of Congress to

> dispose of the public domain, was to destroy an estate which Congress grants in public lands, and was to exercise a power which Congress never intended to delegate, the power to declare the forfeiture of mining claims."

This case, of course, was based upon another provision of the Organic Act, namely section 9, which provided that no law should be passed interfering with the primary disposal of the soil. The case is, however, very closely analogous to the one at bar, for the Legislature in that case as here had merely prescribed an additional regulation. In fact the case is somewhat stronger than the case at bar for the reason that another act of Congress authorized the making of local regulations concerning possessory title, location, manner of recording, and amount of work necessary to hold possession of a mining claim. The necessary result of the decision is that the Territory of Alaska has no power in any manner to increase or diminish the regulations prescribed by the general laws of the United States. A similar ruling was made in the case of *Territory v. Lee,* 2 Mont. 124, which held invalid a territorial statute providing that aliens should not hold mining claims. The court there said:

> "The Territory is not called upon to aid Congress or the Executive in the execution and enforcement of the laws of the general Government, and the voluntary aid of the Territory is without authority, without reason and, therefore, void."

(i) And in General, Where Congress Has Legislated Upon a Subject, the Field is No Longer a "Rightful Subject of Legislation".

And it has been further held in general that when Congress has legislated upon a particular subject, that subject is no longer a rightful one for territorial legislation. It will be remembered that section 9 of the Organic Act provides that the legislative powers of the Territory shall extend to "all rightful subjects of legislation" not inconsistent with the Constitution and laws of the United States. The case referred to is *Allen v. Reed,* 10 Okla. 105; 60 Pac. 782. The court there said:

> "Applying these well-settled principles to the case under consideration, we must come to the conclusion that the subject of fixing the boundaries of the counties of this territory, and the location and changing of the county seats therein, is a rightful subject of legislation under the organic act until such time as the national legislature legislates or enacts a law upon that subject. But when congress legislates upon the subject, as it clearly appears from the various enactments heretofore quoted in this opinion, then that subject ceases to be a rightful subject of legislation, and is inconsistent and incompatible with the laws of the United States. * * *"

It may also be noted that this case expressly adopted the view which we have urged above, that the cases under the Commerce Clause of the Constitution are in point in cases of territorial legislation upon a subject that Congress has considered. On this point the court said:

> "* * * These questions must be emphatically answered in the negative. The rule is well settled by an unbroken current of decisions of the supreme court of the United States that, *where the subject of legislation is within both the legislative power of the United States and of a state or territory, the exercise of such power by congress precludes the authority of the legislature to exercise such power.* As early as 1824, in construing the federal constitution, the question arose whether the power of congress to regulate foreign and interstate commerce is exclusive, or whether the states have concurrent authority to any extent over the same subject. * * *"

The court then proceeded to review a number of the authorities to the same effect as the ones we have above referred to.

(j) The Fish Legislation Pending in Congress Shows that Congress Has Never Intended to Open the Field to Territorial Regulation.

We further call the court's attention to the fact that there is at present pending in Congress a bill to regulate the fisheries of Alaska. This bill is known as H. R. 8143. For the purpose of reference it is attached to this brief in the form of an appendix.

We are advised that this bill will be passed in substantially the present form within a short time and very probably before the argument of this case. The importance of this is that it shows very clearly that Congress has never intended to commit the regulation of fisheries to the Territorial Legislature. As

demonstrating this it should be noted that the bill gives full power to the Secretary of Commerce to regulate fishing within the Territory; to prescribe regulations; fix closed seasons; establish reservations and in general control the whole matter of fishing. It further intrusts the enforcement of the bill to the Secretary of Commerce and the Bureau of Fisheries and not to the Territory or its officers. Finally, and most important, section 5 of the bill prescribes a closed season substantially identical to the closed season set up in the Act of 1906 but covering all of the waters of Alaska in lieu of simply a part of them; in other words Congress is definitely assuming to regulate the particular matter of closed seasons and is prescribing the exact closed seasons that it thinks are necessary. If the present Alaska law is valid, and if in particular Congress has intended to leave the matter of closed seasons to the will of the Territorial Legislature, then the regulations prescribed in this act are entirely unnecessary. Furthermore, such action by Congress is entirely inconsistent with the contention that it ever intended the Territory to have power to legislate upon this matter at all. If the Alaska Act involved in the case at bar is sustained, there is no reason whatever why this new legislation of Congress may not be entirely upset in its whole scheme of operation by socalled "additional" regulations.

(k) The Case of Alaska Fish Salting and By-Products Co. v. Smith, 255 U. S. 44, in No Manner Supports the Act.

It has been thought, and it probably will be contended, that the case of *Alaska Fish Salting & By-Products Co. v. Smith,* 255 U. S. 44; 65 Law. Ed. 489; 41 Sup. Ct. 219, lends some support to the theory that the Alaska Legislature has the power to regulate fisheries. That case considered a law of the Territorial Legislature imposing a rather heavy tax on fish oil, fertilizer and fish meal made from herring. Congress, by the Act of 1906, had imposed a lower tax on such products. The question was the validity of the Alaska law. The decision contains the following language:

> "If Alaska deems it for its welfare to discourage the destruction of herring for manure and to preserve them for food for man or for salmon, and to that end imposes a greater tax on that part of the plaintiff's industry, than upon similar use of other fish or of the offal of salmon, it can hardly be said to be contravening a *Constitution* that has known protective tariffs for a hundred years. (Citing cases) Even if the tax should destroy a business it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk. (Citing cases.) *We need not consider whether abuse of the power might go to such a point as to transcend it, for we have not such a case before us. The Acts must be judged by their contents, not by the allegations as to their purpose in the complaint.*"

In connection with this it should be noted that the language used was employed in meeting the

constitutional objection that the tax deprived the plaintiff of its property without due process of law. It was used in this connection only. It is further to be noted that the court declined to look beyond the face of the act in order to determine its real purpose. The language above italicized indicates this. The court simply felt that the act in question was a legitimate taxing statute and declined to consider the characterization of it which the complaint apparently contained. The language italicized is also significant as suggesting that the power might be so abused as to constitute a violation of the Constitution. On this point we call attention to the case of *Hammer v. Dagenhart,* 247 U. S. 251; 62 Law. Ed. 1101; 38 Sup. Ct. 529. This was a case passing upon the Federal Child Labor Act where Congress had placed such a burden upon the transportation in Interstate Commerce of the products of child labor as substantially to prohibit such commerce. The court there said:

> "The difference between a tax and a penalty is sometimes difficult to define, and yet the consequences of the distinction in the required method of their collection often are important, *where the sovereign enacting the law has power to impose both tax and penalty. The difference between revenue, production and mere regulation may be immaterial, but not so when one sovereign can impose a tax only and the power of regulation rests in another.*"

The language italicized is particularly pertinent. It describes the exact situation which exists in Alaska with reference to regulation of fisheries.

Further, in connection with *Alaska Fish Co. v. Smith,* supra, it is significant that when the court passed upon the contention that the tax amounted to a regulation of fisheries, the court used no such language. It simply said:

> "But it is said that however it may be with regard to the Constitution taken by itself, the statutes brought into question are contrary to the act of Congress from which the local legislature derives its power. In the first place they are said to be an attempt to modify or repeal the fish laws of the United States. The Act of Congress of June 6, 1900, c. 786, sec. 29, 31 Stat. 321, 331; Alaska Compiled Laws, sec. 2569; imposes a tax on fish oil works of ten cents per barrel and on fertilizer works of twenty cents per ton, repeated in slightly different words by the Act of June 26, 1906, c. 3547, 34 Stat. 478; Alaska Compiled Laws, sec. 259. *But these are not fish laws as we understand the phrase.* * * *"

In other words the court decided, *and only decided,* that the act in question did not transcend the limitations of a taxing measure, and that it was merely an additional tax which the Territory was authorized to impose. The language used by the court is perhaps not as happily chosen as it might be, but when carefully considered there is nothing in that case indicating that the court believed or intended to hold that the Territorial Legislature was competent to pass purely regulatory measures with reference to fisheries. In fact the language used, and particularly the words above italicized, "but these are not fish laws as we understand the

phrase", rather supports the inference that if the law *had* been considered a fish law, an entirely different question would have been presented.

The distinction made by the Supreme Court in the case just discussed is brought out even more clearly in the case of *Alaska Pacific Fisheries v. Alaska,* 236 Fed. 52, 149 C. C. A. 262, set out at page 4b *ante.*

The court upheld the law there involved on the theory that the tax provisions in the Act of 1906 were clearly separable from the regulatory features of that act. This is precisely the distinction the Supreme Court has made in the case just cited. The court said in this connection:

> "We cannot agree that the portion of the act of 1906 which provides for license fees and taxes is inseparable from the other provisions of that act. The protection and encouragement of fisheries was evidently one of the main purposes of the act, and the creation of revenue by the imposition of a license tax on the business of canning and manufacturing was another purpose. *Those portions of the act which have to do with the methods of carrying on fishing, and which prescribe the seasons when it may be carried on, and the waters within which it may be carried on, are preserved; but the imposition of additional license taxes to be imposed for carrying on the business was a subject of a different character and, in the judgment of Congress, might properly be entrusted to the wisdom of the newly created legislative assembly.* * * *"

We feel sure that on a careful consideration, and especially on comparison with the *Alaska Pacific*

Fisheries case, the court will come to the conclusion that there is nothing in the *Alaska Fish Salting & By-Products* case which in any wise sustains the law in question here.

(l) The Debates in Congress at the Time of the Adoption of the Organic Act Throw No Light on the Question, and in Any Event Cannot Properly be Referred To.

Finally, on the general question of the power of the Legislature of Alaska to regulate fisheries, we understand that the real basis of the decision in the court below was that the debates in Congress at the time of the adoption of the Organic Act showed that it was not intended to withhold from the Territory the power to pass additional and supplementary fish laws of a regulatory nature. This contention will doubtless be made in this court. The debate referred to is somewhat long and it does not seem worth while to set it out in full. The extract which has been relied upon as showing this intention on the part of Congress is quoted in the case of *Territory v. Alaska Pacific Fisheries,* 5 Alas. 325 at p. 329. The gist of it is that Representative Mann said:

> "We have endeavored to provide in a way for the conservation of the fisheries and game up there. We ought not to permit those laws to be repealed, but if they want to make them more stringent, and probably do, they ought to have that right."

There was more or less lengthy expression of opinion by several other members of Congress, but the statement above quoted is at any rate the most

favorable one to the contention of the defendant in error.

We have two remarks to make in answer to this contention. The first is that, taking the debate on this section of the Organic Act as a whole, it would require more than human ingenuity to determine just what the various members of Congress *did* think the section meant; and second, that in any event the personal opinions of the various Legislators as to the meaning of the act are not a proper source of information for the construction of the act, or in any event, are of such little weight as to be valueless. Upon the first point we have been at some pains to read the entire debate on the Organic Act in the Committee of the Whole of the House, from which extracts above referred to are taken. This debate commences on page 5260 of the Congressional Record, Volume 48, Part 6 of the Second Session of the Sixty-second Congress. The discussion of the fisheries begins on page 5279 and concludes with the extract above quoted at page 6288. We suggest that if the court is disposed to take this position of the defendant in error seriously it read this whole portion of the discussion. We will, however, quote some of the outstanding features of the debate. It should be explained in this connection that section 3 as originally proposed by Mr. Wickersham provided that the Legislature should not alter, amend, modify and repeal the customs, internal revenue, postal and other general laws. The same provision was by amendment made ap-

plicable to the game and fish laws in consequence of the debate:

> Mr. MANN. "Under the provisions of this Bill would the Territorial Legislature have any jurisdiction over the matter of game and fisheries?
>
> Mr. WICKERSHAM. Undoubtedly, except as it might come in conflict with an Act of Congress.
>
> Mr. MANN. Does not the Bill expressly provide that if it does come in conflict with the Act of Congress, the Territorial Legislature may repeal the Act of Congress?
>
> Mr. WICKERSHAM. Not at all.
>
> Mr. MANN. I am very glad to hear the gentleman's opinion about that, *although it is very plainly in the bill.*" (p. 5279.)
>
> Mr. BUTLER. "* * * Is there anything anywhere in this proposed Act that would authorize the Legislature to change the laws in regard to conservation so as to interfere with the policies of the Government in any way in that direction?
>
> Mr. WICKERSHAM. I think not." (p. 5284.)
>
> Mr. WICKERSHAM. "I think no citizen of Alaska has been convicted of a violation of the game laws.
>
> Mr. MANN. I have no doubt that is true. I doubt whether it is very practical to convict a citizen of Alaska under ordinary conditions in the courts up there, for the same reason if they had power to change the game laws. I doubt whether it would be possible to have a law preserving the game of Alaska." (p. 5285.)

Then a little later came the debate set out in 5 Alaska, in the course of which the amendment adding the game and fish laws to the prohibited list was added. Examining this debate it is apparent that Mr. Mann, who was a strong conservationist, be-

lieved that the law, as originally framed without the inhibitions against changing the fish and game laws, would permit the Territorial Legislature to change the policy of Congress with reference to such laws and especially with reference to conservation. The amendment, however, (which in substance was proposed by Mr. Mann) was quite satisfactory to him and he immediately assumed its defense and proceeded to try and convince everyone present that it had no very serious effect. This he may or may not have succeeded in doing. At all events, reading the whole debate it certainly is impossible to determine what Representative Mann thought the amended act meant, and it is likewise difficult to determine what anyone else thought it meant. Representative Flood of Virginia, for example, said:

> "I do not think the amendment means anything, but if it will please anybody to put it in, why let it go" (p. 5288).

We submit that the debate, even assuming that it could control the meaning of a perfectly definite and unambiguous Act of Congress, offers very little consolation to the defendant in error.

We further submit that, assuming that the debate *does* mean something, nevertheless it cannot properly be considered, or at any rate given much weight, in construing the law. The authorities on this point are conclusive. In *Downes v. Bidwell,* 182 U. S. 244 (254), 45 L. Ed. 1088, 21 Sup. Ct. 770. the court said with reference to the debate in the constitutional convention:

"It is unnecessary to enter into the details of this debate. *The arguments of individual Legislators are no proper subject for judicial comment. They are so often influenced by personal or political considerations or by the assumed necessities of the situation that they can hardly be considered even as the deliberate views of the persons who made them, much less as dictating the construction to be put upon the Constitution by the Courts.*"

In *Aldridge v. Williams,* 3 Howard 9 (23), 11 L. Ed. 469, the court said:

"*In expounding this law, the judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage,* nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed."

In *Maxwell v. Dow,* 176 U. S. 581 (601), 44 L. Ed. 597, 20 Sup. Ct. 448, the court said:

"* * * It is clear that *what is said in Congress upon such an occasion may or may not express the views of the majority* of those who favor the adoption of the measure which may be before that body, *and the question whether the proposed amendment itself expresses the meaning which those who spoke in its favor may have assumed that it did, is one to be de-*

termined by the language actually therein used and not by the speeches made regarding it.

"What individual Senators or Representatives may have urged in debate, in regard to the meaning to be given to a proposed constitutional amendment, or bill or resolution, does not furnish a firm ground for its proper construction, nor is it important as explanatory of the grounds upon which the members voted in adopting it. * * *"

In *United States v. Union Pacific Railroad Co.,* 91 U. S. 72 (79), 23 L. Ed. 224, the court said:

"In construing an Act of Congress we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influenced them to vote for or against its passage. The Act itself speaks the will of Congress and this is to be ascertained from the language used."

In *United States v. Freight Ass'n,* 166 U. S. 290 (318), the court said:

"* * * It cannot be said that a majority of both houses did not agree with Senator Hoar in his views as to the construction to be given to the act as it passed the Senate. *All that can be determined from the debates and reports is that various members had various views,* and we are left to determine the meaning of this act, as we determine the meaning of other acts, from the language used therein.

"There is, too, a general acquiescence in the doctrine that *debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body* (Citing cases).

"The reason is that it is impossible to determine with certainty what construction was

put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that *the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed.* (Cases cited, supra.) If such resort be had, we are still unable to see that the railroads were not intended to be included in this legislation."

To the same effect are:

Dunlap v. United States, 173 U. S. 65 (75), 43 L. Ed. 616, 19 Sup. Ct. 319;

American Net & Twine Co. v. Worthington, 141 U. S. 468 (474), 35 L. Ed. 821, 12 Sup. Ct. 55;

Knowlton v. Moore, 178 U. S. 41 (72), 44 L. Ed. 969, 20 Sup. Ct. 747.

It seems to us that these authorities should put any question of the effect of this debate definitely out of this case.

II.

THE LAW IS ALSO INVALID FOR THE REASON THAT IT IS A SPECIAL AND LOCAL ACT.

A reference to any map will show that the act in question is limited to a comparatively small portion of the Territory of Alaska. The act operates

only in the area south of the sixtieth parallel of latitude and east of the one hundred and thirty-ninth meridian of longitude. It further subdivides this area into that above and that below the fifty-seventh parallel of latitude, and prescribes materially different rules for these two sub-areas. The act in no manner affects the Territory west of the one hundred and thirty-ninth meridian. In other words, it is an act confined in its operation to Southeastern Alaska and is not even uniform in its operation over this circumscribed territory. All of the fishing grounds of Southwestern and Western Alaska are left entirely without regulation. It is obvious without argument that this is a local and special act.

In this connection the applicable acts of Congress are as follows:

Section 9 of the Organic Act (ubi supra) which provides among other things:

> "Nor shall the Legislature pass local or special laws in any of the cases enumerated in the Act."

The Act of July 30, 1886 (24 Stats. 170; 9 Fed. Stats. Ann. Second Edition 557) provides:

> "That the legislatures of the territories of the United States now or hereafter to be organized *shall not pass local or special laws* in any of the following enumerated cases, that is to say * * * *the protection of game or fish* * * *. In all other cases where a general law can be made applicable, no special law shall be enacted in any of the territories of the United States by the territorial legislature thereof."

So far as we have been able to find there are only two cases passing on the question of what constitutes a local game or fish law: The first of these is *State v. Higgins,* 51 S. C. 51; 28 S. E. 15. In this case a fish law which was confined in its operation to two counties was held to be a local game law within a constitutional inhibition in all respects identical in meaning with the act of Congress above quoted. The court said:

> "* * * The manifest object of the act was to protect fish in the waters of Colleton and Berkeley counties, and, if fish can be regarded as game, then, being a local or special law providing for the protection of game, it is in conflict with the section of the constitution last referred to, for that section expressly forbids the enactment of any local or special law 'to provide for the protection of game'. The authorities clearly show that fish can and should be classed as game * * *."

The court also held that the act in question covered a subject to which a general law could have been made applicable and said:

> "It seems to us also that the act in question, viewed in the light contended for by the state, must be regarded as in violation of another subdivision of section 34 of article 3. Subdivision 11 of that section declares that, 'in all other cases where a general law can be made applicable, no special law shall be enacted.' It is very clear that this is a case where a general law could have been made applicable. This is conclusively shown by the terms of the first section of this very act, which, if it stood alone,

> would have been a good general law; but when the legislature saw fit, by the provision in the third section, to limit its operation to certain specified localities, the act was deprived of its character as a general law, and became a special or local law concerning a subject, and for a purpose expressly forbidden by the constitution."

The second case is *Commonwealth v. Drain,* 99 Ky. 162; 35 S. W. 269. In that case the contention was made that a provision in a game law providing for a division of fines between the county and the county officer arresting violators of the law constituted special legislation, within a constitutional prohibition against special legislation for the protection of game and fish. The court in overruling this contention said:

> "* * * That instrument does prohibit special legislation providing for the protection of game and fish; *but, manifestly, this was to remedy the common evil then prevalent, of having laws on this subject in force in some localities, and not in others.* We think the statute a general one, and in no sense special or local, within the meaning of the prohibitory clause of the constitution * * *."

The case clearly gives the reason and policy of such prohibitions. There can be no doubt that this is the policy behind such provisions. The theory clearly is to prevent the Legislature from so specializing the game and fish laws as to have a sepa-

rate game or fish code in force in each different county or other governmental subdivision.

In addition to these two cases the following authorities define what is meant by local laws. In *Commonwealth v. Patten,* 88 Pa. St. 258 (260) the court said:

> "There can be no proper classification of cities or counties except by population. *The moment we resort to geographical distinctions we enter the domain of special legislation* for the reason that such classification operates upon certain citizens or counties to the perpetual exclusion of all others."

In 1 *Lewis' Sutherland Statutory Construction,* 2nd Ed., section 199, a local law is defined as a law which is special as to place.

In *Guthrie National Bank v. Guthrie,* 173 U. S. 528, 43 L. Ed. 796, 19 Sup. Ct. 513, the question was whether or not a certain statute was a local one for the regulation of practice of courts of justice. The court held that the praticular act involved was not objectionable on that score, but used the following pertinent language:

> "The prohibition of the statute of Congress relates to the passing of a law by the territorial legislature, local or special in its nature, which does in effect regulate the mode of procedure in a court of justice *in some particular locality* or in some special case, thus altering in such locality or for such case the ordinary course of practice in the courts."

In *Territory v. Baca,* 6 New Mexico 420; 30 Pac. 864, the court considered a territorial law providing for twenty-one grand jurors in counties where a court was held for the trial of causes arising under the federal laws and for only twelve grand jurors in all other counties. The court held this statute invalid, saying:

> "* * * This, we think, is clearly in contravention of the act of congress approved July 30, 1886, which provides that no local or special law shall be enacted by the legislature of any territory for summoning or impaneling grand or petit jurors * * *."

In 36 *Cyc.* 986, the following definition appears:

> "A local act is an act applicable only to a particular part of a legislative jurisdiction."

III.

CONCLUSION.

In concluding we desire to make just one observation. That is, that the act in question is plainly merely a "feeler" on the part of the Territorial Legislature.[3] If this act is sustained it is a safe prophecy that the Legislature which convenes

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(3) By House Concurrent Resolution No. 15 (Sess. L. Al. 1923, p. 309) the Attorney General is directed "to bring one action, *only,* and to carry and prosecute the same through the courts, for the purpose of determining the validity of said act; and reporting the outcome of the same to the 1925 Session of the Territorial Legislature."

the coming winter will pour forth a flood of laws designed to regulate game, fisheries and numerous other matters which Congress has not seen fit to intrust to its jurisdiction. In the nature of things, such regulations under the guise of "supplements" and "additions" to the congressional laws must necessarily result, first, in a complete subversion of the will of Congress upon the matters with reference to which it has legislated; and second, in a hopeless confusion as to just what laws actually are in force in the Territory of Alaska. The present fish bill now in Congress which will undoubtedly be passed will be subject to such tampering as the Territorial Legislature may see fit to do; and the result will be that the complete scheme of regulations which Congress, by the Act of 1906 and the pending bill, will be subverted and distorted beyond recognition.

The situation as to fisheries in Alaska, involving as it does the interests of residents of the Pacific Coast states and the comparative interests of the citizens of Alaska, is such that the only feasible system of regulation is a control directly by Congress. Only by having such a unified control can the conflicting rights of the various parties be equitably adjusted. We submit that the acts of Congress are calculated to reserve to the national government such jurisdiction.

We believe that the decision of the lower court is wrong, for the reason that the Territory of Alaska

has no power to regulate fisheries, and for the further reason that, in any event, the regulation here established is a local law.

Dated, San Francisco,
May 21, 1924.

Respectfully submitted,

CHICKERING & GREGORY,
KERR, MCCORD & IVEY,
H. L. FAULKNER,
R. E. ROBERTSON,
Attorneys for Plaintiff in Error.

(APPENDIX FOLLOWS.)

Appendix.

Appendix

A BILL

For the Protection of the Fisheries of Alaska, and for Other Purposes.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, that for the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska the Secretary of Commerce from time to time may set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction, and within such areas may establish closed seasons during which fishing may be limited or prohibited as he may prescribe. Under this authority to limit fishing in any area so set apart and reserved the Secretary may (a) fix the size and character of nets, boats, traps or other gear and appliances to be used therein; (b) limit the catch of fish to be taken from any area; (c) make such regulations as to time, means, methods, and extent of fishing as he may deem advisable. From and after the creation of any such fishing area and during the time fishing is prohibited therein it shall be unlawful to fish therein or to operate therein any boat, seine, trap, or other gear or apparatus for the purpose of taking fish; and from and after the creation of any such fishing area in which limited fishing is permitted such fishing shall be carried on only

during the time, in the manner, to the extent, and in conformity with such rules and regulations as the Secretary prescribes under the authority herein given: Provided, That every such regulation made by the Secretary of Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce. The right herein given to establish fishing areas and to permit limited fishing therein shall not apply to any creek, stream, river, or other bodies of water in which fishing is prohibited by specific provisions of this Act, but the Secretary of Commerce through the creation of such areas and the establishment of closed seasons may further extend the restrictions and limitations imposed upon fishing by specific provisions of this or any other Act of Congress.

Sec. 2. In all creeks, streams, or rivers, or in any other bodies of water in Alaska, over which the United States has jurisdiction, in which salmon run, and in which now or hereafter there exist racks, gateways, or other means by which the number in a run may be counted or estimated with substantial accuracy, there shall be allowed an escapement of not less than 50 per centum of the total number thereof. In such waters the taking of more than 50 per centum of the run of such fish

is hereby prohibited. It is hereby declared to be the intent and policy of Congress that in all waters of Alaska in which salmon run there shall be an escapement of not less than 50 per centum thereof, and if in any year it shall appear to the Secretary of Commerce that the run of fish in any waters has diminished, or is diminishing, there shall be required a correspondingly increased escapement of fish therefrom.

Sec. 3. Section 3 of the Act of Congress entitled "An Act for the protection and regulation of the fisheries of Alaska", approved June 26, 1906, is amended to read as follows:

"Sec. 3. That it shall be unlawful to erect or maintain any dam, barricade, fence, trap, fish wheel, or other fixed or stationary obstruction, except for purposes of fish culture, in any of the waters of Alaska at any point where the distance from shore to shore is less than one thousand feet, or within five hundred yards of the mouth of any creek, stream or river into which salmon run, excepting the Karluk and Ugashik Rivers, with the purpose or result of capturing salmon or preventing or impeding their ascent to the spawning grounds, and the Secretary of Commerce is hereby authorized and directed to have any and all such unlawful obstructions removed or destroyed. For the purposes of this section, the mouth of such creek, stream, or river shall be taken to be the point determined as such mouth by the Secretary of Commerce and

marked in accordance with his determination. It shall be unlawful to lay or set any seine or net of any kind within one hundred yards of any other seine, net or other fishing appliance which is being or which has been laid or set in any of the waters of Alaska, or to drive or to construct any trap or any other fixed fishing appliance within six hundred yards laterally or within one hundred yards endwise of any other trap or fixed fishing appliance."

Sec. 4. Section 4 of said Act of Congress approved June 26, 1906, is amended to read as follows:

"Sec. 4. That it shall be unlawful to fish for, take, or kill any salmon of any species or by any means except by hand rod, spear, or gaff in any of the creeks, streams, or rivers of Alaska; or within five hundred yards of the mouth of any such creek, stream, or river over which the United States has jurisdiction, excepting the Karluk and Ugashik Rivers: Provided, That nothing contained herein shall prevent the taking of fish for local food requirements or for use as dog feed."

Sec. 5. Section 5 of said Act of Congress approved June 26, 1906, is amended to read as follows:

"Sec. 5. That it shall be unlawful to fish for, take, or kill any salmon of any species in any manner or by any means except by hand rod, spear, or gaff for personal use and not for sale or barter in any of the waters of Alaska over which the post meridian of Saturday of each week until six o'clock United States has jurisdiction from six o'clock

ante meridian of the Monday following, or during such further closed time as may be declared by authority now or hereafter conferred, but such authority shall not be exercised to prohibit the taking of fish for local food requirements or for use as dog feed. Throughout the weekly closed season herein prescribed the gate, mouth or tunnel of all stationary and floating traps shall be closed, and twenty-five feet of the webbing or net of the 'heart' of such traps on each side next to the 'pot' shall be lifted or lowered in such manner as to permit the free passage of salmon and other fishes."

Sec. 6. Any person, company, corporation, or association violating any provision of this Act or of said Act of Congress approved June 26, 1906, or of any regulation made under the authority of either, shall, upon conviction thereof, be punished by a fine not exceeding $5000 or imprisonment for a term of not more than ninety days in the county jail, or by both such fine and imprisonment; and in case of the violation of section 3 of said Act approved June 26, 1906, as amended, there may be imposed a further fine not exceeding $250 for each day the obstruction therein declared unlawful is maintained. Every boat, seine, net, trap, and every other gear and appliance used or employed in violation of this Act or in violation of said Act approved June 26, 1906, and all fiish taken therein or therewith, shall be forfeited to the United States, and shall be seized and sold under the direction of the court in which the forfeiture is declared, at public

auction, and the proceeds thereof, after deducting the expenses of sale, shall be disposed of as other fines and forfeitures under the laws relating to Alaska. Proceedings for such forfeiture shall be *in rem* under the rules of admiralty.

That for the purposes of this Act all employees of the Bureau of Fisheries, designated by the Commissioner of Fisheries, shall be considered as peace officers and shall have the same powers of arrest of persons and seizure of property for any violation of this Act as have United States marshals or their deputies.

Sec. 7. Sections 6 and 13 of said Act of Congress approved June 26, 1906, are hereby repealed. Such repeal, however, shall not affect any act done or any right accrued or any suit or proceedings had or commenced in any civil cause prior to said repeal, but all liabilities under said laws shall continue and may be enforced in the same manner as if committed, and all penalties, forfeitures, or liabilities incurred prior to taking effect hereof, under any law embraced in, changed, modified, or repealed by this Act, may be prosecuted and punished in the same manner and with the same effect as if this Act had not been passed.

No. 4245

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit.

AUK BAY SALMON CANNING COMPANY, a Corporation,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Upon Writ of Error to the United States District Court of the Territory of Alaska, Division Number One.

BRIEF OF DEFENDANT IN ERROR.

A. G. SHOUP,
United States Attorney,
For Defendant in Error.

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit.

AUK BAY SALMON CANNING COMPANY, a Corporation,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Defendant in Error.

The case is stated in the brief for the plaintiff in error.

MOTION TO QUASH.

Before pleading defendant filed a Motion to Quash the Indictment (Transcript, p. 6), which motion was by the Court denied. One of the defendant's assignments of error is, that the Court erred in denying and refusing to grant its motion to quash the indictment.

Section 2191, Compiled Laws of Alaska 1913, provides the grounds for setting aside an indictment; it mentions only two, the first being when the indictment is not found, indorsed and presented

as prescribed in chapter 6 of the same title, and the second ground is when the names of the witnesses are not endorsed on the indictment, as provided therein. Section 2197, Compiled Laws of Alaska, provides that the only pleading on the part of the defendant shall be a demurrer or plea. These sections specify the grounds for which a demurrer will lie and these grounds, generally speaking, run only to the sufficiency of the indictment. Section 2208 states what pleas shall be entertained by the Court. These sections were all taken from the Laws of Oregon, and, of course, the construction of such statutes by the Supreme Court of Oregon will have great weight in the construction of these sections here. In the case of State vs. Gilliam, 124 Pac. 256, the Supreme Court of the State of Oregon held that under L. O. L., Section 1500, which authorized a plea of guilty or not guilty, or a former conviction or acquittal against an indictment, a plea in abatement is improper. The same Court in State v. Whitney, 7 Or. 386, said that, as this enactment limits the pleas that may be interposed to an indictment, it necessarily excluded all others, and therefore the motion to quash must be excluded under the Compiled Laws of Alaska. We submit that the motion to quash in this case should not be noticed.

I.

AUTHORITY OF THE LEGISLATURE TO PROVIDE ADDITIONAL PROTECTION FOR THE FISHERIES OF ALASKA.

The limitation in section 3 of the Organic Act

on the power of the legislature to amend, alter, modify or repeal the fish and game laws of the United States applicable to Alaska manifestly referred to the Acts of Congress for the protection of the fish and game in Alaska, and not to the general or common law. This is shown not only by the wording of the limitation itself, but by the contex of the general wording of section 3. However, where a statute is of doubtful construction, the Courts are entitled to consider the debates of Congress to determine exactly what was intended by the law-making body. U. S. vs. St. Paul etc. Ry. Co. et al, 62 L. Ed. Sup. Ct., page 1134. The phrase of the Organic Act of the Territory of Alaska from which it is contended that the Alaska legislature was without power to enact chapter 95 of the Territorial Session Laws of 1923, was inserted in the Act as an amendment while it was on its passage in the Committee of the Whole in the House of Representatives. The subject was fully debated, and the report of that debate (Cong. Record April 24, 1912, pp. 5278, 5284, *5288*), shows clearly that it was the conclusion of every member who took part in that debate that the amendment would operate only to prevent the territorial legislature from repealing or modifying laws of Congress then in force for the protection of the Alaska game and fish, but was no inhibition against the legislature passing additional restrictive laws. It was not the desire or intention of Congress to limit the legislature's power to further protect the game and fish of Alaska, and the hope was expressed

that the territorial legislature would do that very thing. Mr. Flood, of Virginia, the Chairman of the Committee that reported the bill, agreed with the proponents of the amendments that they would not prevent the legislature from passing additional regulatory laws. The territorial legislature, by section 4 of chapter 95, disclaimed any purpose on its part to alter, to amend, to modify, or to repeal any of the fish laws of the United States applicable to Alaska, but provided that chapter 95 should be construed to provide for further and additional protection to the fisheries of Alaska.

When Congress refused to extend to the legislature of Alaska unlimited authority over the fisheries, it was due to the fear, clearly expressed, that the new legislature might not impose upon the right to fish, such protection as would be sufficient to prevent depletion of the fishing grounds and thus permit the industry to be destroyed.

When the creation of the new legislature came up for discussion, Congress had already enacted certain restrictions designed to protect the future of the fishing industry. This protection Congress did not want torn down. It was, therefore, provided in the Organic Act that the new legislature should have no authority to modify these restrictions. That idea was expressed in section 3. If Congress had intended to restrain the legislature from exercising any jurisdiction whatever over the fisheries, that idea would have been expressed also.

In Alaska Fish Salting and By-Products Co. v. Smith, 255 U. S. 44, the Supreme Court took the

position that if the legislature thought it necessary for the protection of the Herring Fisheries to limit or even to prohibit the catching of herring for certain purposes, it had authority to do so. In that case, the taxing power was employed. But no reason presents itself why the general police power might not be employed for the same purpose.

The Court distinctly approved of the authority of the legislature to impose restrictions in addition to those imposed by Congress.

The "common right of fishery" is a common-law right. The restrictions imposed by Congress are intended to express the minimum restrictions under which Congress would permit fishing in Alaska, thus leaving it optional with the legislature to impose additional safeguards for the perpetuation of the industry.

This theory finds support not only in the report of the debates over the Organic Act when that measure was before the House, and in the decision of the Supreme Court above cited, but in analogous principles announced by the House of Representatives in the first contest of Wickersham vs. Sulzer, and by the Court of Appeals in Northmore vs. Simmons, 97 Fed. 386.

Congress had enacted a complete code prescribing rules and regulations for elections in Alaska, including a form for a ballot. In 1915, the legislature enacted a law prescribing additional rules for safeguarding the free expression of the public sentiment at the polls. The contestant took the position that this law transcended the authority of the legis-

lature, because Congress had already prescribed how elections were to be conducted.

The House of Representatives decided that the rules prescribed by Congress were the minimum restrictions tolerated by Congress and that the legislature had authority to enact additional restrictions. But it was also decided that the change in the qualifications of voters embodied in the territorial law was void, because it did not restrict but did expand the qualifications.

In the Northmore case it was decided that local regulations which only restricted the rights extended by Congress were not in conflict with the Congressional Act fixing restrictions under which mining claims might be located and held.

It should be noted that the courts have been ever extremely liberal in construing the power granted to territorial legislatures. Unless it appears very plainly that it was not the intent to delegate a power, it is presumed as having been granted under the authority to legislate on all "rightful subjects."

Let it also be remembered that Congress by its regulation of fisheries assumed to grant no right, but only assumed to restrict a right which already existed as a matter of common law. Additional restrictions, therefore, abridge no right bestowed by Congress and conflict with no Congressional enactment.

The fish are the property of the people of the territory. It must be assumed, therefore, that it was the intent of Congress to permit the people to manage their own property, except to the extent

that limitation on that power was expressed in the Organic Act.

McCready vs. Virginia, 94 U. S. 391.
Corfield vs. Coryell, 6 Fed. Cas. 3231,
Bennett vs. Boggs, 3 Fed. Cas. 1319.
State vs. Medbury, 3 R. I. 141.
State vs. Corson, 67 N. J. L. 185.
Haney vs. Compton, 36 N. J. L. 509.
Meul vs. People, 64 N. E. 1106.

The case of Betsch vs. Umphrey, 270 Fed. 45, is cited in support of the contention that the territorial legislature could prescribe no additional regulations touching a subject upon which Congress had already legislated. That case dealt directly, as counsel say, with the organic provision that the territorial legislature could pass no law interfering with the primary disposal of the soil. It in no way abrogates the rule laid down in the Northmore case, *supra,* but affirms the rule that if the required annual assessment work on mining claims is done in fact, title will not lapse because of a failure to record the affidavit. The Betsch case does not say that *additional work* cannot be required by the state or territory.

The recent passage by congress of the so-called White Bill for the protection of Alaska fisheries, we believe, strengthens the theory that Congress did not intend that the restriction in section 3 of the Territorial Organic Act would prevent the territory from providing additional protection to the fisheries of Alaska. Section 7 of the new law pro-

vides, among other things, that "all penalties, forfeitures, or liabilities incurred prior to taking effect hereof, under any law embraced in, changed, modified, or repealed by this Act, may be prosecuted and punished in the same manner and with the same effect as if this Act had not been passed".

Then, just before the final passage of the bill, Congress added a new section (8) as follows:

> "Section Eight. Nothing in this act contained nor any powers herein conferred upon the Secretary of Commerce, shall abrogate or curtail the powers granted the Territorial Legislature of Alaska, to impose taxes or licenses, nor limit or curtail any powers granted the Territorial Legislature of Alaska by the Act of Congress approved August 24th, 1912, to create a Legislative Assembly in the Territory of Alaska, to confer legislative power thereon, and for other purposes."

The Territorial Legislative Act (Ch. 95, S. L. 1924) had been submitted to Congress soon after its approval by the Governor, and Congress manifestly had that law in mind when it enacted the provisions just quoted.

It may be said that the new law does not repeal the Territorial Act involved in the case at bar, but we are inclined to think it does. When the same matter is the subject of legislation by Congress and a territorial Legislature, the acts of Congress supersede those of a Territorial Legislature.

Clayton vs. Utah, 132 U. S. 632.
Davis vs. Broson, 133 U. S. 333.
El Paso etc. R. R. Co. vs. Gutierrez, 215 U. S. 87.
Mark vs. Dist. Columbia, 37 L. R. A. (N. S.) 440.
See also Brunswick First Natl. Bank vs. Yankton County, 101 U. S. 129.

II.

LOCAL LEGISLATION.

It is contended by the defendant, that chapter 95 of the Alaska Territorial Session Laws of 1923 is in contravention of the so-called Springer Law of July 30, 1886, which is specifically made a part of the Organic Act of Alaska, and which prohibits the passage by the territorial legislature of any local or special law in certain enumerated cases, one of which is for the protection of game and fish.

If it is conceded that Congress intended to grant the territorial legislature some police power over the game and fish of Alaska, it then becomes necessary to inquire what is meant by the phrase "local or special law" when applied to the game and fish of the territory. If it means that the words "local laws" intend that the territorial legislature could pass no law for the protection of the game or fish where it did not operate exactly the same in every part of the vast domain of Alaska, without consideration of the habits of the various species of game and fishes in different sections; without regard to the sharp contrast of seasons and the es-

sential differences of conditions regarding the fisheries of one part of Alaska with another; without regard to any of the very many reasons why a game or fish law could not operate uniformly throughout that immense region and still serve a practical purpose, then such grant of police power is without practical benefit to the people and it would be futile for the legislature to attempt to protect or preserve the game or fish of the territory. Every law that has ever been passed for the protection of the game or fish of Alaska has had regional application.

Going back only to the law of June 26, 1906, which was the last law passed by Congress for the protection of the Alaska salmon fisheries, until the law of June, 1924, we find a weekly closed season for taking salmon in any of the waters of Alaska *except Cook Inlet, the Delta of the Copper River, Behring Sea and the waters tributary thereto.* The exception was made for practical purposes because of peculiar conditions existing at those places. The closed seasons for hunting game are different in different parts of the Territory. The habits of salmon in Alaska are very similar to the habits of salmon in the State of Oregon in respect to their approaching the spawning grounds in different localities at different seasons. The subject of the habits of salmon in the spawning season is ably discussed in the case of Portland Fish Co. et al. vs. Benson et al., 108 Pac. 122.

We submit that the term "local law" when applied to a law for the protection of fish or game

does not necessarily mean a law that operates in every part of the legislative jurisdiction. But we think a local law for the protection of the game or fish is a law that protects the fish or game for the benefit of the people of a restricted locality, but a law is not local which prohibits fishing in a specified part of the territory where the salmon are spawning, and applies to the persons residing in such closed zone exactly as it does to everyone else in the territory and is designed to protect the salmon for the general welfare of all the people of the territory, whether they happen to live within the closed zone or not. Chapter 95 is not local merely because it is operative only in that part of the territory where the conditions necessary for its operation exist. It creates no monopoly in anyone nor does it confer any special privileges. The justification for this law is the necessity of the preservation of the fish.

Judge Wolverton in the case of Ladd vs. Holmes (66 Pac. 716), defined the rule by which it is to be determined whether a law is local or general, even though it have but a local application, as follows:

> "A law may be general, however, and have but a local application, and it is none the less general and uniform, because it may apply to a designated class, if it operates equally upon all the subjects within the class for which the rule is adopted; and, in determining whether a law is general or special, the Court will look to its substance and necessary operation, as well

as to its form and phraseology. People vs. Hoffman, 116 Ill. 587, 5 N. E. 596, 8 N. E. 788, 56 Am. Rep. 793; Nichols vs. Walter (Minn.) 33 N. W. 800. This is the accepted rule everywhere.

"Referring to a provision in the constitution of North Dakota of similiar import to the one here invoked, Mr. Chief Justice Corliss says: 'To say that no classification can be made under such an article would make it one of the most pernicious provisions ever made in the fundamental law in the state. It would paralyze the legislative will. It would beget a worse evil than unlimited legislation,—grouping together without homegeneity of the most incongruous objects under the scope of an all-embracing law.' Edmonds vs. Herbrandson, 2 N. D. 970, 971, 14 L. R. A. 725, 727. The greater difficulty centers about the classification. It may not be arbitrary, and requires something more than a mere designation by such characteristics as will serve to classify. The mark of distinction must be something of substance, some attendant or inherent peculiarity calling for legislation suggested by natural reason of different character to subserve the rightful demands of governmental needs. So that, when objects and places become the subject of legislative action, and it is sought to include some and exclude others, the inquiry should be whether the distinctive characteristics upon which it is proposed to found different treatment are such

as in the nature of things will denote in some reasonable degree a practical and real basis for discrimination. Suth. St. Const., secs. 127, 128; Nichols vs. Walter, *supra;* Edmonds vs. Herbrandson, *supra;* Richards vs. Hammer, 42 N. J. Law, 435; People vs. Board of Sup'rs of Adam Co., 185 Ill. 288, 56 N. E. 1044. Accordingly it was held that a law general in its scope, framed upon a classification governed by these distinctive principles, is not special or local because there happens to be but one individual of the class, or one place in which it has actual and practical operation. Van Riper vs. Parsons, 40 N. J. Law, 1; s. c. (second appeal), 40 N. J. Law, 123, 29 Am. Rep. 210. A statute, however, which is plainly intended to affect a particular person or thing, or to become operative in a particular place or locality, and looks to no broader or enlarged application, may be aptly characterized as special and local, and falls within the inhibition."

Judge Bean said in the case of State vs. Savage (184 Pac. 570) that:

"The equality clause only requires that the law, when impartially applied, shall operate equally and uniformly upon all persons in similiar circumstances, and confers like privileges to all who may comply with its terms or come without its provisions. It does not prohibit legislation which is limited either in the objects in which it is directed, *or by the terri-*

tory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like conditions."

Harwood vs. Wentworth, 162 U. S. 547; 16 Sup. Ct. 890.
25 R. C. L. 814, 816.
12 C. J., p. 1118, sec. 835.
Gray vs. Taylor, 227 U. S. 51.
Arms vs. Ayer, 61 N. E. 855.
Potwin vs. Johnson, 108 Ill. 70.
Ex parte Fritz, 38 So. 725.
Long vs. State, 92 N. E. 653.
Allen vs. Hersch, 8 Ore. 425.
State vs. Borough Summers Pt., 18 Atl. 694.
Douglas vs. People ex rel. Ruddy, 80 N. E. 341.

III.

CLASS LEGISLATION.

It is argued that chapter 95, Alaska Session Laws of 1923, is contrary to the Organic Act of Alaska, and particularly to section 9 thereof, in that, without the affirmative approval of Congress, it grants to certain corporations, associations and individuals certain special and exclusive immunities, privileges and franchises; that it is contrary to the Constitution and violates the equal protection of the laws clause of the Fourteenth Amendment; that it abridges the privileges and immunities of citizens and violates the due process of law clause of the Fifth and Fourteenth Amendments of the Constitution.

Chapter 95 is copied substantially from the laws of the State of Washington which were construed in the case of State vs. Tice (125 Pac. 168), in which it was said that the section regulating the fishing for salmon and making a different closed season in different waters of the state is not class legislation, or arbitrary or unreasonable, as it affects equally and impartially all persons similarly situated. The Court in the Tice case referred to the early case of Hayes vs. Territory (2 Wash Ter. 286, 5 Pac. 927), in which it was said that a game law does not confer a "special privilege" because restricted in its operation to five counties.

In the case of Sherrill vs. State (106 S. W. 967), the Court said: "The statute prohibiting the use of fish traps in any waters of the state, except in certain counties, is not unconstitutional because granting to the citizens of such counties privileges and immunities not extended equally to all other citizens, since the legislature may, in the exercise of its police power, put into operation game and fish laws in localities where they are needed, and such laws apply in such localities to all persons equally."

We submit that chapter 95 is not void as class legislation because the closed season is limited to waters where such closed season can be made practical and operative and does not apply to other waters where such a closed season would operate against the very purpose for which the law was enacted. Individuals have no inherent or other property rights in the fish in their natural state

but the fish belong to the Government and Territory as trustees for the people of the future state. Private persons or corporations cannot complain of laws that are designed to protect the fish for the benefit and general welfare of all the people.

State vs. Catholic (Ore.), 147 Pac. 372.
Osborn vs. Charlevoix, Cir. Judge, 72 N. W. 982 (Mich.); 26 C. J. 625.
McCready vs. Virginia, 94 U. S. 391.
Ashon vs. Board of Commrs. for Protection of Birds, etc., 185 Fed. 221.
State vs. Hanlon (Ohio), 82 N. E. 662.
State vs. Savage, 184 Pac. 567 (Oregon).
National Bank vs. County of Yankton, 101 U. S. 129, 133.
Simms vs. Simms, 175 U. S. 162.

In Wagner vs. People, 97 Ill. 333, it is said: "The ownership being in the people of the state—the repository of the sovereign authority—and no individual having any property rights to be affected, it necessarily results that the Legislature, as the representative of the people of the state, may withhold or grant to individuals the right to hunt and kill game, or qualify or restrict it, as, in the opinion of the members, will best subserve the public welfare. Stated in other language, to hunt and kill game is a boon or privilege granted either expressly or impliedly by the sovereign authority, not a right inhering in each individual, and consequently nothing is taken away from the individual when he is denied the privilege at stated seasons of hunting and killing game. It is perhaps

accurate to say that the ownership of the sovereign authority is in trust for all the people of the state, and hence, by implication, it is the duty of the Legislature to enact such laws as will best preserve the subject of the trust and secure its beneficial use, in the future, to the people of the state. But in any view the question of individual enjoyment is one of public policy and not of private right."

"Tiedeman in his valuable work on State and Federal control of persons and property (vol. 2, sec. 151), says: 'Where the prohibition was limited to the killing of game and the catching of fish in the public lands and streams of the state, no possible question could arise as to the constitutionality of the regulation, for the reason that no one's rights of property could be violated in such case. THE RIGHT TO HUNT AND FISH IN SUCH CASE IS AT BEST ONLY A PRIVILEGE WHICH THE STATE MAY GRANT OR WITHHOLD AT ITS PLEASURE."

"While it is true, in a sense, that the right to fish is a common or general right, yet it is equally true that laws regulating the exercise of this right must of very necessity be local rather than general in their character, and hence they may, and should be, adapted to the various needs of different localities and waters."

Geer vs. Connecticut, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793.

Hayes vs. Missouri, 120 U. S. 71, 7 Sup. Ct. 352, 30 L. Ed. 578.

Barbier vs. Connelly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923.

IV.

EXEMPTION OF TROLLERS.

Some point has been made of the fact that salmon trollers are exempt from the operation of Chapter 95, Territorial Session Laws of 1923. The record in this case, testimony of H. R. Thompson (transcript, pp. 19, 20, 21), discloses that an entirely different species of fish are caught by the trollers than are caught and canned by the cannery companies. The only fish taken by the trollers are the king salmon and cohoes and these are taken on the feeding grounds; that practically all king salmon are either shipped fresh or mild cured. Whereas, on the other hand, the salmon taken by canneries, with other gear than trolling, is mostly sockeye, humpback and dog salmon, and those fish are only caught when they are on the way to the spawning ground in the spawning season. Fish caught by trollers are taken at all seasons of the year and are never taken on the spawning grounds. It may be mentioned also that there is no discrimination in the law against salmon canners catching king salmon or cohoes during the closed season with trolling gear, if they so desire. The legislature could have specified the particular kind of salmon which could not be taken during the closed season, but the legislative intent is plain.

See State vs. Higgins, 38 L. R. A. (N. S.) 561.
State vs. Blanchard, 189 Pac. 421.
Re Berger, 3 L. R. A. (N. S.) 530, 90 S. W. 759.

V.

CRIME AGAINST UNITED STATES.

The defendant raised the point that neither the Act of August 24, 1912, nor the act of August 29, 1914, gave the territorial legislature any authority to enact laws constituting crimes against the United States. We submit that the Organic Act, approved August 29, 1914, answers that contention. That amendment reads as follows:

> "An Act to amend an Act entitled 'An Act creating a legislative assembly in the Territory of Alaska, and conferring legislative power thereon, and for other purposes,' approved August Twenty-fourth, nineteen hundred and twelve.
>
> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That nothing in the Act of Congress entitled 'An Act creating a legislative assembly in the Territory of Alaska and conferring legislative power thereon, and for other purposes,' approved August twenty-fourth, nineteen hundred and twelve, shall be so construed as to prevent the courts now existing or that may be hereafter created in said Territory from enforcing within their respective jurisdictions all laws passed by the legislature within the power conferred upon it, the same as if such laws were passed by congress, nor to prevent the legislature passing laws imposing additional duties, not inconsistent with the present duties of their respective

officers, upon the governor, marshals, deputy marshals, clerks of the district courts, and United States Commissioners acting as justices of the peace, judges of probate courts, recorders, and coroners, and providing the necessary expenses of performing such duties, and in the prosecuting of all crimes denounced by territorial laws the cost shall be paid the same as is now or may hereafter be provided by Act of Congress providing for the prosecution of criminal offenses in said Territory, except that in prosecutions growing out of any revenue law passed by the legislature the cost shall be paid as in civil actions and such prosecutions shall be in the name of the Territory."

VI.

TACIT APPROVAL.

Sec. 20, Organic Act: "That all laws passed by the Legislature of the Territory of Alaska shall be submitted to Congress by the President of the United States, and, if disapproved by Congress, they shall be null and of no effect."

In the case of Clinton vs. Englebrecht (13 Wall. 434), the Supreme Court, in the opinion delivered by Chief Justice Chase, laid down the doctrine or rule that when for a number of years Congress has taken no action on a Territorial law it is a reasonable inference that it has approved the law. That rule has been consistently followed by the Courts since. It will be assumed, in the absence of express disapproval that the act was considered as extending to a rightful subject of legislation not incon-

sistent with the Constitution or laws of the United States (Board of Trustees of Whitman College vs. Berryman, 156 Fed. 122).

The doctrine of tacit approval was emphasized in the case of Sawyer vs. El Paso & N. E. Ry. Co. (108 SW 718), in which the Court said:

> "The legislation of the Territory must not be in conflict with the laws of Congress conferring the power to legislate, BUT A VARIANCE FROM IT MAY BE SUPPOSED APPROVED BY THAT BODY IF SUFFERED TO REMAIN WITHOUT DISAPPROVAL FOR A SERIES OF YEARS AFTER BEING REPORTED TO IT."

Territory vs. Alaska Pac. Fisheries, 5 Alaska, 325.

U. S. vs. Miyata, 4 Alaska, 436.

Hampton vs. Columbia Canning Co., 3 Alaska, 100.

Shively vs. Bowldy, 152 U. S. 1.

The doctrine of tacit approval by Congress has application in the case at bar from the fact that the same limitation against altering and amending the fish laws of the United States applicable to Alaska exists as to the game laws, and both were inserted in the Organic Act as a part of the same amendatory provision. On April 29, 1915, Chapter 62 of the Session Laws of 1915, entitled "An Act to prevent the wanton destruction of game animals within the Territory of Alaska, and providing punishment therefor," was approved. That law is supplementary to the game laws of the United

States applicable to Alaska and is intended to afford a further protection to the deer and other wild food animals within the territory. It provides that anyone with intent to wantonly destroy said animals without making every effort to have such animal utilized for food shall be guilty of a misdemeanor and punished. The law further provides that any person who shall have knowledge of any violation of the Act and who shall fail to report the same to the authorities shall be guilty of a misdemeanor and shall be punished. This law was reported to Congress in 1915 and has never been disapproved, and may therefore be considered as approved.

Chapter 95 of the Session Laws of 1923 was submitted by the President to Congress soon after its passage and has not been disapproved by Congress.

CONCLUSIONS.

The passage of chapter 95 of the Alaska Session Laws of 1923, providing for further protection of the salmon fisheries of Alaska, was a rightful subject of legislation by the territorial legislature, so long as said chapter 95 did not alter, amend, modify or repeal the fish laws of the United States applicable to Alaska in force at the time of the approval of the Territorial Organic Act, on August 24, 1912.

Chapter 95 is not a local or special law for the protection of the fish. It was enacted in the general welfare of all the people of the territory for the preservation of the salmon while on the spawning grounds during a part of the spawning season, and confers no special privileges or immunities. It op-

erates equally upon all persons who come within the scope of the legislation.

The exemption of trolling fishing confers no special privilege because it permits the catching for commercial purposes of the nomadic king salmon on their feeding grounds.

Violations of chapter 95 are crimes against the United States under the provisions of the amendment to the Organic Act, approved August 29, 1914. The territorial legislature is a subordinate branch of Congress with delegated powers. The control of the Alaska fisheries is unified because Congress has complete power to amend or annul acts of the legislature.

This law and the game law of 1915 were both submitted to Congress and neither one was disapproved. It may, therefore, be assumed that Congress considers further protection of the fish and game a rightful subject of legislation by the territorial legislature, and also that Congress has tacitly approved chapter 95.

For the foregoing and other reasons, it is respectfully submitted that the judgment in the District Court should be affirmed. In any event, it is most important to all concerned that this case be decided before the beginning of the closed season on August 10th, 1924.

A. G. SHOUP,
United States Attorney.

Due service and receipt of a copy of the within is hereby admitted this —— day of June, 1924.

_____,
Attorney for Plaintiff in Error.

No. 4245

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AUK BAY SALMON CANNING COMPANY
(a corporation),
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

CHICKERING & GREGORY,
KERR, MCCORD & IVEY,
H. L. FAULKNER,
R. E. ROBERTSON,
Attorneys for Plaintiff in Error.

Subject Index

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REPLY BRIEF FOR PLAINTIFF IN ERROR.

The principal questions in the case are covered rather fully in our opening brief. There are, however, a few matters raised either in the oral argument or by the briefs of the defendant in error and the amicus curiae, which we desire to notice briefly.

I.

THE TERRITORIAL LEGISLATURE HAS NO POWER TO PASS ANY SO-CALLED "ADDITIONAL REGULATIONS."

This point was argued at some length in our opening brief, but it has been raised in a somewhat new aspect by the answering briefs, and as we

gather it the substance of the argument there presented is as follows:

That the Act of 1906 is purely a restrictive measure, that consequently its provisions can only be "altered, amended, modified or repealed" by relaxing those restrictions, that the Territorial Act in question does not relax them, but, on the contrary, makes them more stringent, and that consequently the Territorial Act is valid.

To say the least this argument is highly refined. It would seem obvious that a restriction of any given sort is modified and altered by making it more stringent and causing it to apply to cases theretofore outside its operation. It would be hard to convince a fisherman engaged in catching salmon in the area closed by the statute in question on August 10th that the Act of Congress had not been modified and altered by the Territorial Act. As an obvious and incontrovertible fact it *has* been altered in that prior to the passage of this act it was lawful to fish in the area in question on August 11, 1924, and that subsequent to the passage of the act, if the act is valid, it has become unlawful. That stubborn fact conclusively controverts any such technical argument.

Furthermore an examination of the syllogism discloses that it rests upon the premise that the Act of 1906 is wholly a restrictive measure. This is obviously not true. The title of that act is "An act for the protection and regulation of the fisheries

of Alaska." It is, as this title implies, a protective and likewise a regulatory measure. It has some restrictive provisions, some purely regulatory provisions and numerous provisions of a constructive nature designed to encourage Alaskan fisheries.

Again, it is to be noted that the power to pass additional laws up the subjects mentioned in Section 3 of the Organic Act was granted only in the case of licenses and taxes. That section enumerates several subjects of Congressional legislation, concerning which power was expressly withheld from the Territory to alter, amend, modify or repeal. Following this restriction is a proviso to the effect that such prohibition "shall not operate to prevent the Legislature from imposing other and additional licenses or taxes." By the familiar rule that the expression of the one is the exclusion of the other, it is evident that Congress intended the Territory to have power to pass such additional laws in the case of taxes and licenses and in that case only. Differently stated, the manner in which this Section 3 is constructed demonstrates that Congress believed that the words "alter, amend, modify or repeal" included the sense of "add to." Otherwise there was no necessity for the proviso saving the right of the Legislature as concerned licenses and taxes.

Furthermore an examination of the prior decisions of this court and particularly the case of *Alaska Pacific Fisheries v. Alaska,* 236 Fed. 52, shows conclusively that this court has upheld prior statutes taxing the fishing industry upon the sole

ground that such statutes were simple and bona fide revenue measures, and that the proviso just mentioned expressly gave to the Territory the right to impose such taxes. Time and again in the decision referred to the court reiterates and emphasizes the fact that the act there in question was a pure revenue measure and as such stood upon a different footing from measures regulating fisheries.

Language more clearly calculated to point out these precise distinctions could hardly be hit upon, and we submit that a reading of this opinion will demonstrate the logical impossibility of sustaining the contentions of the defendant in error and the amicus curiae without overruling that case.

Finally, both the defendant in error and the amicus curiae rely strongly upon the case of *Northmore v. Simmons,* 97 Fed. 386, a case from this court.

That case upheld a mining regulation of the Mojave Mining District, which provided for the doing of more assessment work than the federal statute required. This regulation was upheld upon the theory that the Act of Congress prescribed merely the minimum amount of work necessary to hold a mining claim. From this defendant in error and amicus curiae argue that the Act of 1906 merely prescribes the minimum length of closed season in the salmon industry and leaves it to the Territorial Legislature to fix a maximum. The

argument is ingenious but it is entirely invalidated by the fact that the federal statute involved in the *Northmore* case expressly authorized the making of regulations with respect to the amount of work necessary to hold a mining claim. This court very properly held that this express authorization must mean something and that inasmuch as the minimum had been fixed by Congress the Mining Districts must have the right to fix a maximum.

That, however, is quite a different matter from the question involved here. For the *Northmore* case to be in point on the question at issue the Organic Act would have had to provide that the Territory might "pass acts regulating the matter of closed seasons." The Organic Act, of course, contained no such provision, but, on the contrary, did lay down the rule that the Territory should have no power whatever to change the fishing laws. Obviously, the *Northmore* case has no application.

II.

THE FACT THAT THE TERRITORY COULD NOT PRESUMABLY REPEAL THE POSTAL AND OTHER GENERAL LAWS EVEN IN THE ABSENCE OF THE SAVING CLAUSE OF SECTION 3 IN NO MANNER INVALIDATES OUR ARGUMENT.

It was suggested at the oral argument by the court and has been alleged on page 10 of the brief of the amicus curiae that the Territory would not in any event have the right to alter, amend, modify

or repeal the postal, internal revenue and other general laws of the United States; and from this premise the conclusion is drawn that the mention of the fishing laws in the same section, and in the same grammatical construction, throws no light upon the intent of Congress as to the power of the Legislature to change the fishing laws.

Whether or not the Territory could change the postal, internal revenue and other general laws in the absence of a specific prohibition such as that contained in Section 3 is not material. It may even be conceded for the purpose of argument that the Territory would have no such power. The fact nevertheless remains that Congress thought it advisable to make assurance doubly sure and expressly and positively withheld such right. No one can doubt what Congress had in mind when it referred to these general laws in Section 3. It obviously meant that these entire fields of legislation were reserved to Congress alone.

At the risk of repetition we again insist that it makes no conceivable difference whether this restriction was necessary or not. The point is that the restriction was made and that the intention of Congress in making it is perfectly evident. This being so it must be fully as obvious that Congress had the same intention with reference to the fish laws, and evidenced this intention by placing them in the same category, in the same section, and subject to the same operative words, namely, "alter, amend, modify or repeal."

We have here four simple verbs having as their objects the postal and certain other laws, and "fish laws." No logical process with which we are familiar is sufficient to demonstrate that these verbs mean one thing as to the first of their objects and another thing as to the second.

III.

ALASKA FISH COMPANY v. SMITH, 255 U. S. 44, AND HAAVIK v. ALASKA PACKERS ASSOCIATION, 44 SUPREME COURT REPORTER, 177, HAVE NOTHING TO DO WITH THE PRESENT CASE.

Both of these cases were referred to in the oral argument and are cited in both answering briefs as establishing the rule that the Territory has the right to regulate fisheries. We discussed the *Smith* case at some length in our opening brief and shall not repeat what was there said. We do wish to insist, however, that this case decides merely that a certain act was a revenue act, and, as such, valid under the express authorization of "additional licenses and taxes."

It was there urged that the act in question altered, amended, modified and repealed the fish laws because it increased the rate of taxation imposed by Section 1 of the Act of 1906. With reference to this contention the court said "These are not fish laws as we understand the phrase". This is absolutely all that the court did decide in that case and this is no more than was decided by this court in

the case of *Alaska Pacific Fisheries v. Alaska,* 236 Federal 52, already referred to.

To sum this question up we may point out that if the law in question here is not a fish law it is not any kind of a law, and that consequently the *Smith* case has no bearing here as the Supreme Court itself said in that case,

The laws there involved *were not fish laws.*

So far as the *Haavik* case is concerned it merely decided that a poll tax of $5.00 per year on non-resident fishermen did not contravene the federal constitution. There is not a word in it which even remotely suggests that the Territory might have the right to regulate fisheries.

IV.

TACIT APPROVAL OF THE ACT BY FAILURE TO DISAPPROVE.

Both briefs make the point that this act was submitted to Congress soon after its approval and has never been disapproved by Congress. They make the same suggestion with reference to a certain game law passed by the Territory in 1915. From the failure of Congress to take any action with respect to either bill it is argued that Congress considered them valid.

In answer to this we submit first that the rule laid down by the courts attaches no substantial importance to such failure to act. It is true that long

continued acquiescence by Congress in an act of a territory may be some slight evidence of its validity; but it is not true that failure to annul constitutes a recognition of power to pass legislation in conflict with the Acts of Congress.

Clayton v. Utah, 132 U. S. 632.

In the second place it is obvious as a matter of plain common sense that such inaction by Congress affords no reliable test as to whether or not Congress considered the Territorial laws valid. The Congress of the United States is a very busy institution. As a matter of common knowledge it frequently fails to reach important matters upon its calendar; and it is absurd to argue that failure to notice a comparatively obscure territorial statute constitutes a formal adjudication of its validity. If such inaction is evidence of anything it is rather to the point that no member of Congress considered it worth while to push the matter.

V.

THE WHITE BILL.

The White bill was approved by the president and became a law substantially in the form set out in the appendix to our opening brief, with the addition of Section 8, a copy of which we filed at the oral argument. We wish to point out that this bill is no broader in *scope* than the Act of 1906. Its provisions are different; the rules of con-

duct laid down by it are different, and further authority is given to the Department of Commerce to control and regulate fisheries; but the field covered is not one whit broader than the field covered by the Act of 1906. Both acts legislate with reference to the time and manner of taking fish, the protection of fish, executive administration of the law, and in particular with reference to closed seasons.

It is conceded that the White bill invalidates the act in question here. It must likewise be conceded that the Act of 1906 invalidates the Territorial Act. In both cases Congress has entered and covered the same field. It makes no difference that in the case of the White bill the regulations by Congress are more detailed and more burdensome. The important point is that, Congress having entered the field, the Territorial Legislature has no power to act with reference to the subjects dealt with by Congress.

So far as Section 8 of the White bill is concerned we submit that it has no bearing on this case. It merely provides that the bill shall not be construed to abrogate or curtail the power of the Territory to impose taxes nor any powers which it might have under the Organic Act. It does not in any manner attempt to define what powers the Territory did have under the Organic Act. Consequently it is of no importance in construing the Organic Act.

VI.

LOCAL LEGISLATION.

As stated in our opening brief the question upon which we think this case should be decided is the one of the authority of the Territorial Legislature to regulate fisheries in any respect. This principle is the important one which we hope will be settled by this case. However, we do feel very confident that this particular act is invalid as local legislation. Both of the answering briefs have gone into this question at length and we do not feel justified in reviewing the case as cited specifically. As stated in the answering briefs the decisions are not in harmony. They fall, however, in general into three main groups.

1. Cases in which a Legislature has passed an act providing for one set of rules for one class of objects and another set for another class, there being more than one object on each class. A familiar example of such legislation is that classifying municipal corporations according to population as cities of the first, second and third class, etc.

Where there is more than one city of each class, the courts invariably uphold such laws upon the obvious principle that the legislation operates upon all of the cities of a given class alike; that there is more than one city of each class, and that *any city is eligible for a higher class as its population increases.* With such cases as this we have no concern here because the classification attempted by the

Territory is purely geographical; and second, because by no possibility can anyone of these geographical districts enter the class of another.

2. The second group of cases comprises those in which a classification is made and there is only one object comprised within a certain class. Upon the question presented by such cases the courts are in hopeless conflict. Some of them uphold such laws upon the theory that a city of one class, in the case of municipal legislation, can enter another by increasing its population and that therefore such acts are not special and local. The majority of courts, we believe, hold such laws invalid upon the theory that they are intended to apply to only one object, although the language of general legislation is employed; and that such an evasion cannot be employed to avoid plain constitutional limitations.

3. A third class of cases includes those in which a Legislature attempts directly to legislate with respect to a certain limited portion of the Territory under its jurisdiction. There are, perhaps, some few cases upholding such laws, but the great weight of authority is undoubtedly to the effect that the act which refers only to a particular locality is a local law.

The case at bar falls within the third class of cases and the authorities cited in our opening brief are, we believe, conclusive upon the question.

We might suggest that the case of *State v. Savage,* 184 Pac. 567, as quoted from at length on page 13 of

the brief of defendant in error, is an additional authority in support of our position. This case contains the following language:

> "*Where there is no express constitutional restriction against the passage of local laws by a State Legislature* the Courts cannot hold such laws void for want of constitutional authority to enact them unless they are clearly discriminatory or merely arbitrary. There is a distinction between special laws and class legislation."

The language quoted by the defendant in error was addressed to the contention that such a local law was invalid as class legislation. We have made no such contention here. We do urge, however, that it is invalid because it is a local law. The case of *State v. Savage* clearly indicates that the law there in question would have been invalid if any such constitutional restriction had existed.

Both briefs argue that it cannot be presumed that Congress intended to limit the power of the Territory of Alaska to pass local legislation, in view of the fact that local legislation is alleged to be absolutely necessary in the case of a territory of the area of Alaska. The answer to this is that the prohibition against local legislation is not contained in the Organic Act itself but in the Act of Congress of July 30, 1886 (9 Fed. Stat. Ann. Sec. Ed. 557), which provides that the territories shall pass no local or special laws in a very large number of enumerated cases, among them being laws for the protection of game or fish. This act was adopted

by the Organic Act and extended to the Territory of Alaska by a single clause in Section 9 of the Organic Act.

The point is that the Act of 1886 was passed without reference to the Territory of Alaska and was intended to apply to all territories in general. It is common knowledge that in many states a substantially different game and fish law is in force in every county or in every group of two or three counties. Such, for instance is the situation in the State of Washington. The various constitutional provisions adopted by the statutes, and the particular inhibition made by the Act of 1886, were intended to meet and prevent this evil. It may be that in making this law applicable to the Territory of Alaska Congress has done something unwise. That, however, is beside the question. The intention of Congress clearly was to avoid the confusion incident to a multiplicity of different game laws within each territory.

This explanation of the origin of the prohibition against local legislation also serves to meet the contention made in the brief of amicus curiae at page 15, to the effect that a prohibition of local legislation with respect to the protection of fish implies power to pass some legislation with reference to fish. The Act of 1886 being a general statute applying to all territories was simply adopted bodily by the Alaska Organic Act; and the fact that it mentions the protection of game and fish cannot in any sense be considered an abandonment of the clear

and special provisions of Section 3 of the Organic Act.

CONCLUSION.

In concluding we would urge that the court decide the present case, if possible, before August 10th, upon which date the closed season in question here becomes effective, according to the terms of the act. We hardly imagine that in view of the White bill and the regulations established under it there will be prosecutions this year. There were, however, a great number last year, and if this act is permitted to stand upon the books it is quite possible that the same procedure may be adopted and great expense and inconvenience caused.

We again respectfully submit that the decision of the lower court was wrong and should be reversed.

Dated, San Francisco,
July 16, 1924.

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NO. 4245

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AUK BAY SALMON CANNING COMPANY,
(a Corporation),
Plaintiff in Error,
vs.
United States of America,
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BRIEF OF ATTORNEY GENERAL OF ALASKA
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STATEMENT OF THE CASE

Two reasons have been assigned by Counesl for plaintiff in error why the judgement in this case should be reversed. These reasons are: first, that the legislature of the Territory has no authority to enact any statutes regulating fisheries; second, that the statute in question is local and

for that reason is a violation of the Act of 1886 which enjoins the legislature from passing local or special laws for the protection of game or fish.

These problems will be discussed in the order in which they are presented in the brief of counsel for plaintiff in error.

I.

THE ORGANIC ACT GIVES THE LEGISLATURE AUTHORITY TO REGULATE FISHERIES.

It should be noted that it is not Section 3, but Section 9, of the Organic Act which bestows the legislative powers upon the local legislature.

Section 9 provides that "the Legislative powers of the Territory shall extend to all rightful subjects of legislation."

Had the Organic Act stopped at that point, the clause above quoted would have delegated to the Legislature of the Territory all authority which Congress itself possessed over the Territory, exclusive, however, of the Federal functions of Congress, i. e., the functions delegated to Congress by the sovereign States.

The protection of game and fish are rightful subjects of legislation, and subjects which do not belong to Congress in its Federal capacity, but over which it is given jurisdiction by the Constitution in its sovereign authority over de-

pendencies which have for themselves no independent sovereignty.

Binns vs. U. S., 194 *U. S.* 486.

The question now arises as to whether the limitations upon the legislative authority of the Territory prohibits the local legislature from enacting any laws tending to regulate the fisheries.

The clause in Section 3 relied upon by plaintiff in error was inserted when the bill was before the House. The debate on the floor clearly shows that the reason for the amendment was the fear that some legislature of the Territory might undertake to liberalize, if not to repeal, the restriction which Congress in former Acts, more especially by the act of 1906, had imposed upon the common right of fisheries. The debate very clearly shows that the purpose and intent of Congress was to permit the legislature to enact additional restrictions upon the rights of fisheries, but to prohibit any change which had a tendency to expose fish or game to destruction.

The important part of this debate is set out in the opinion of the lower Court in the case of Territory vs. Alaska Pacific Fisheries, 5 Alaska Rep. 325.

Explicitly as the intent of Congress is expressed in the records of the bill, it is not, however, necessary to resort to that record for the purpose of solving the problem now before the Court:

The common right of fishery is a right conferred by the common-law and guaranteed by

Magna Charta. It was not, and did not have to be, conferred upon the people of the Territory by any statutory enactment. All the congressional legislation on the subject consists of restrictions upon that right of fishery which inherently belongs to every inhabitant of the Territory. Section 3 simply provides that no modification shall be made of those restrictions.

The fish laws, being in their nature purely restrictive, can be modified, altered or amended only by relaxing them. No attempt has been made to do so. Additional restrictions cannot be said to relax, and therefore cannot be said to modify, the restrictions imposed by Congress.

This view is quite consistent with the manner in which the Courts have interpreted similar restrictions upon State or Territorial authority to legislate on certain subjects within the jurisdiction of the Federal Government.

For instance, Section 2324 R. S. of the United States provides:

"The miners of each mining district may make regulations not in conflict with the laws of the United States or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession, subject to the following requirements: ***** on each claim located and until patent has been issued therefore, not less than $100.00 worth or labor shall be

performed or improvements made during each year."

The Mojave mining district in California had adopted a mining reglation which provides that, "within 90 days of location, a shaft shall be sunk or a tunnel run to a depth of not less than 10 feet from the apex of the ledge of mineral bearing quartz; otherwise, the claim shall be subject to relocation." This Court held that this mining regulation was valid and not in conflict with the Federal enactment because it did not undertake to diminish, but only to increase, the work required by Congress.

Said the Court:

> "The statute was intended to express the most liberal terms on which the United States would part with its rights in mining claims. No state legislature nor local mining regulation may grant more favorable terms than those which are demanded by the statute. It contains the full extent of the requirements of the United States."

Northmore vs. Simmons, 97 *Fed.* 386.

The same point was decided in the same manner by the upreme Court of Nevada in the case of Sissons vs. Sommers, 55 Pac. 829.

In Mining Company vs. Kerr, 130 U. S. 256, the Supreme Court held that a state regulation might reduce the width of a mining claim from 300 feet on each side of the middle of the vein to 25 feet of each side. And in Erhardt vs. Boaro, 113 U. S. 527, the same tribunal held

that a state law requiring a discovery shaft to be sunk upon the lode was a valid requirement for the legal location of a mining claim.

In the case at bar it may well be said, paraphrasing the language of this court in Northmore vs. Simmons, that the restrictions upon the common right of fishery contained in the federal fish law were intended to express the most liberal terms on which the United States would permit fishing to be conducted in Alaska. No legislature may grant more favorable terms than those which are demanded by the Federal statute. But that statute contains the full extent of the requirements of the United States, and additional requirements may be imposed by the local legislature.

An analogous situation arose over the election laws of the Territory of Alaska.

Section 5 of the Organic Act provides, "that the Act of Congress entitled, 'An Act providing for the election of a delegate to the House of Representatives from the Territory of Alaska,' approved May 7th, 1906, or Acts amendatory thereof, shall continue to apply to all elections except so far as it is modified by this Act."

The Act of 1906, 34 Stat. L. 169, provided for the form of the ballot to be used. That form was simply an adoption of the old system of voting in vogue prior to the advent of the Australian system.

By Chapter 25, Laws of Alaska for 1915, the legislature adopted the Australian system of voting and provided for filing of declarations of candidacy and the printing of official ballots.

The election of Delegate to Congress from Alaska in 1916 resulted in a contest between James Wickersham and Charles A. Sulzer. Judge Wickersham took the position that the Territorial election law was an amendment or modification of the election proceedure prescribed by Section 5 of the Organic Act. But that contention was not sustained by the House of Representatives. The election committee, as well as the House of Representatives, took the position that it was within the authority of the local legislature to adopt additional safe-guards for the conduct of elections to carry out the general scheme of Congress.

To the same general purpose are the cases holding that the states of the Union may enact liquor laws restricting the sale or possession of intoxicants in addition to the restrictions provided by Congress.

Vigliotti vs. Pennsylvania, 258 *U. S.* 403.
See also Reid vs. Colorado, 187 *U. S.* 148.

In determining whether or not a Territorial law is in conflict with a Federal law the purpose of the latter must be kept in mind. If the object of the Federal law is not to confer certain privileges, but to limit certain common-law rights, then and in that case any local legislation which

still further limits or restricts those rights or provisions is not considered as conflicting with, but as assisting in ,carrying out the general purpose of the Federal legislation.

The question here at issue fairly arose in the case of Alaska Fish Salting and By-products Company vs. Smith, 255 U. S. 44. In that case the Territorial legislature was accused of having levied an excise tax which had a tendency to destroy the industry of herring fishing for certain purposes. Plaintiff in error took the position that the tax was an attempt to regulate fishing in the waters of Alaska. The Supreme Court ruled that such authority was possessed by the Territorial legislature, and if the local legislature thought it wise to put a stop to the fishing of herring for certain purposes, it had a good right to do so even though it utilized the taxing power for that purpose.

It would seem self-evident that if the legislature could employ the taxing power for the purpose of limiting fishing, or stopping fishing entirely, it could just as well and with the same right apply the general police power. The taxing power is only a branch of the police power.

In a still more recent case the Supreme Court held, even more explicitly, if possible, that the legislature of the Territory could regulate the fisheries by placing restrictions upon them.

Haavik vs. Alaska Packers Association 264 U. S. (44 Sup. Ct.)

In that case, which was decided last January, it appears that the legislature of the Territory had levied a license tax of $5.00 upon non-resident fishermen, while no tax was levied upon resident fishermen. The law was attacked, first, on the ground that the Territory had no authority to regulate the fisheries, second, on the ground that the law violated the equality clause of the 14th amendment to the Constitution; third, on the ground that it violated the fifth amendment to the Constitution; fourth, that it violated the Interstate Commerce clause, and, fifth, that it violated Section 2 of Article IV of the Constitution, which provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

The Supreme Court held that the power of the legislature in the matter of levying this regulatory tax was equal to the power of Congress itself, that the power to make the regulation had been delegated by Congress to the legislature, and that the only question remained as to whether or not Congress itself could have enacted such a law.

In conformity with the ruling of the Supreme Court in the case of the Territory of Alaska vs. Troy 258 U. S. 101 it was held that the word "state" when employed in the Constitution precluded the idea of a "territory" and that therefore neither the provisions of Section 2 of Article IV nor the equality clause of the 14th amendment applied to the Territory.

The discriminatory tax upon non-resident fishermen was sustained on the ground that Congress had authority to levy such a tax and that this authority had been delegates to the legislature.

It would seem that this decision should settle the question of the authority of the local legislature to regulate the fisheries of Alaska by increasing the restrictions placed upon the common right of fishery by the Federal enactments.

A plausible argument is adduced by counsel from the accident that in Section 3 of the Organic Act the fish laws were placed in a category with customs laws, internal revenue laws, and postal laws, and it is insisted that if the Court holds that the legislature may regulate the fisheries, it must, perforce, hold that it has authority to add something to the postal, internal revenue and customs laws of the government.

The first answer to this contention is that while the fish laws are purely restrictive, the customs laws, revenue laws and postal laws are creative. The latter laws establish certain departments or bureaus to carry on certain public work and prescribe the method for so doing. Any addition to those laws is in its nature a modification of them.

In the second place it is obvious that the last named laws were enacted by virtue of the Federal functions of Congress. These functions can-

not be delegated either to a state, a territory or a department of the government. The proviso in Section 3 prohibiting modification of those laws was therefore entirely unnecessary. Congress could not, even if it had tried, delegate any authority to amend, modify or repeal those laws.

Counsel seems to have overlooked the fact that Congress, in dealing with Alaska, acts in a dual capacity,—in the capacity of a Federal legislature, and in the capacity of a territorial legislature. Its authority as a territorial legislature may be delegated, but its authority as a federal legislature may not be delegated. The fear expressed by counsel that affirmation of the judgement in this case will imply an authority in the legislature to enact statutes regulating customs duties, internal revenue and the postal service is entirely unfounded.

That no significance should attach to the fact that the fish laws enacted by Congress were placed in the incongruous category so glaringly brought out by counsel is evident from the history of the Act itself.

The bill, H. R. 38, which was before the House at the time of the debates referred to, was a Committee Substitute for H. R. 38, introduced by James Wickersham, Delegate from Alaska, April 4, 1911. Section 4 of the original H. R. 38, reads as follows:

> "That the Constitution of the United States, and all the laws thereof which are

> not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States; that all the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by Act of Congress; that all of the laws of the United States establishing a civil government in Alaska, and extending the laws of the United States thereto, shall continue in full force and effect until altered, amended or repealed by or with the consent of Congress."

Another bill, H. R. 19860, introduced the previous session by Mr. Hamilton, then chairman of Committee on Territories, was also before the committee for discussion together with other bills aiming to create some form of territorial home rule.

It appears, that in preparing the committee substitute, Section 8 of the Hamilton bill was adopted as Section 3 of the committee substitute in place of Section 4 of the Wickersham bill, hence the incongruity. When Mr. Willis of Ohio moved his amendment on the floor of the House, he inserted it where the language employed seemed to be fitting and sufficient, but with the express statement, that, as before pointed out, it was intended only to restrain the legislature from relaxing the restrictions upon the common right of fisheries.

Some importance is, by counsel for plaintiff in error, attached to the fact that during this present month a bill did pass Congress regulating fisheries in Alaska.

It will be observed that even when the Organic Act was before the House for discussion, another bill was pending before Congress placing additional limitations upon the right of fishery, and during the discussion it was conceded by all parties interested, that, even if the then pending fish bill became a law, it did not take away from the legislature the authority to make additional restrictions.

The Alaska fish law which was passed during the present month is simply an expression of the dissatisfaction of Congress with the failure of the local legislature to properly restrict fishing in territorial waters. Chapter 95 of Laws of 1923, the act here involved, applies only to Southeastern Alaska, and leaves the waters on both sides of Alaska Peninsula subject to depletion. Had the legislature acted with sufficient promptitude in passing restrictive measures, it is probable that Congress would have taken no further steps in the matter.

It is also urged that the Alaska fish law of 1906 gives the Department of Commerce and the Bureau of Fisheries full control over the fisheries of Alaska, and that this contention is demonstrated by the fact that the President withdrew large areas of the fishing grounds from the public, calling them reserves, and dividing them up among individuals.

The illegality of this proceeding is beyond doubt, and can be pardoned only on the theory of emergency.

During the month of November, 1923, in the City of Washington, D. C., a suit in equity was commenced against the Secretary of Commerce to enjoin him from carrying out this so-called "reserve system." As an answer to that suit, on the first day after Congress had been organized, and on the 6th day of December, 1923, two bills were introduced with the identical purpose, one a copy of the other, one being introduced in the enate by Jones of Washington as S. 486, and the other in the House by Mr. White of Maine as H. R. 2714. Those two bills simply provided that the President should have a right to create fish reserves in the waters of Alaska by suspending the common right of fishery, and to prescribe rules and regulations under which fishing might be conducted.

Section 6 of the fish law of 1906 provides that the Secretary of Commerce may, in his discretion, set aside any streams or lakes as preserves for spawning grounds, in which fishing may be limited or entirely prohibited; and when, in his judgement, the results of fishing operations in any stream, or off the mouth thereof, indicates that the number of salmon taken is larger than the natural production of salmon in such stream, he is authorized to establish closed seasons or to limit or prohibit fishing entirely for one year or

more within such stream or within 500 yards of the mouth therof.

This is the authority, and also the limitation upon the authority, of the executive department of the government to create fish reserves. Here its power begins and ends.

The common right of fishery is a property right belonging to each individual. The sea is not owned by the government as a proprietor. The governmental authority is only *jus regium*, a right to regulate.

II.

THE LEGISLATION IS NOT LOCAL.

The Act of July 30, 1886, provides, "That the legislatures of the territories***** shall not pass local or special laws*****for the protection of game or fish."

The direct inference from the language is that the legislature does have authority to pass laws for the protection of game and fish. The question which remains to be answered is whether or not the law here in question is "local or special."

What is and what is not the local statute is at times difficult to determine, and it may be conceded that the authorities are not in entire harmony. The doctrine on this subject laid down by Judge Denio and followed in New York and very largely throughout the rest of the country seems sound and reasonable.

Under a constitution which prohibits local or private laws the legislature of New York enacted a statute providing for punishment of larceny when committed in New York much more reverely than when committed any where else in the state. In holding the law constitutional, Judge Denio said:

"The provisions of the act under direct consideration, which relates to police justices and courts and their clerks, may be considered local; but I am of the opinion that the 33d section, which provides for an increased punishment for petit larceny, when committed by stealing from the person, in the city of New York, is not local within the meaning of the Constitution. It has, no doubt, features which savor of locality, for it punishes a well-known common-law offense more severely, if committed under peculiar circumstances within the limits of the city, than if committed elsewhere. But it prescribes the rules of conduct for all persons whether residents of the city or of any other part of the state, and its increased penalties are intended to protect residents of other localities equally with the inhibitants of the city; and it was probably intended especially for the security of strangers and sojourners who are apt to lack the habitual caution of permament citizens of large towns. Offenders when convicted are to be imprisoned in one of the prisons of the state out of the city, and to be provided for at the expense of the state at large; and the disqualifica-

tion which attaches to a convict under the act affects him whenever he may be in this state. I cannot think that a statute having such consequences is to be classed with special provisions making appropriations for particular roads, public buildings, or the like, situated in particular local divisions. Upon this point I concur with the views expressed in the opinion given in the Supreme Court."

Williams vs. People, 24 *New York* 405.

In Healy vs. Dudley, 5 Lans., 115, 120 et. seq., the Court held that the criterion by which to determine whether an act is local or general is to enquire whether under it the people of the state can be affected; if not, it is local, if they can be, it is general.

Of a more recent date is the case of Ferguson vs. Ross 13 N. Y. S. 398. In that case the Court considered the question of whether or not a law prohibiting the deposit of offal in the bay of New York or Rarita bay was local. The Court held it was not and in that behalf said:

> "The statute in question operates upon a subject in which the people of the world are interested.—Its purpose was essentially public, and the fact that it wears some local features is insufficient to place it among the local acts *****
>
> "We think that, in as much as the act in question operates upon a subject in which the whole people are interested, and prescribes a rule of conduct for all persons, and renders all persons liable to its penalties, where-

ever they reside, it is to be considered a general, as contra distinguished from the local, act."

This case was affirmed by the Court of Appeals of New York, 126 N. Y. 459. In sustaining the law the Court said:

"The fact that an act operates only upon a limited area, or upon persons within a specified locality, and not generally throughout the state, is in most cases a reasonably accurate test by which to determine whether the act is general or local. But it is not decisive in all cases. The entire state may be interested in the enactment and execution of a law operating territorially upon a particular section of the state only.

"In some general sense all the people are or may be interested in laws of a public character, although local, as for example in the administration of justice in the city of New York, the construction and reparation of streets and highways, in whatever locality they may be. This is not, however, such a direct interest as makes laws providing for local courts in a specified locality, or for the construction of a bridge, general. But are laws regulating quarantine in the port of New York, or the landing of immigrants therein, local in the same sense as laws relating to city courts, or to a particular highway or street? The eighth section of the act of 1886 was manifestly enacted for the protection of the harbor of New York in the interest of commerce and navigation. The citizens of New York City may possibly have a greater stake in the matter than citizens in other localities. But the destruction or serious impairment of the harbor of New York would directly affect the prosperity of the state. It

> would impair its revenues, imperil its system of river, canal, and railroad transportation, and it is not too much to say that every industrial interest, agricultural or mechanical, would feel its blighting influence. A law having for its object the protection of the navigation in the harbor of New York, is, we think, general, and not local. The act is limited territorially, but the subject is both public and general."

In Devardelaben vs. State, 99 Tenn. 649 (42 S. W. 684), the Court considered the validity of a law which declared it a crime to bet money on a horse race if the betting took place outside of an inclosure but lawful if it took place within the inclosure. In sustaining the law the Court gives as its reason that the law applied to all persons alike, because "persons on the inside of the inclosure may go out and those on the outside may go in."

In West v. Blake, 4 Blackf, 236, the Supreme Court of Indiana says:

"Statutes incorporating counties, fixing their boundaries, establishing court houses, canals, turnpikes, railroads, etc., for public uses, though operating upon local subjects, are not for that reason necessarily special or local."

In Maxwell v. Tillamook County, 26 Pac. 803, an Act appropriating a sum of money for the building of a wagon road in a certain county of the State of Oregon was held special and local as being intended for the benefit of that particular county and its inhabitants only.

In People v. Allen, 42 N. Y. 378, an Act appropriating money for the improvement of the Boquet River was held to be a local act because of the insignificant character of the Boquet River and because the improvement of the same would be mainly for the benefit of the people living in the immediate locality. In that case the Court intimates, however, that an Act for the improvement of the Hudson River would not be a local but a general one, because of it being the connecting link in the chain of water communication between the ocean and inland lakes.

Under a constitutional provision inhibiting the enactment of "local or special" laws for "laying, opening, and working highways" the Supreme Court of Oregon in the case of Oregon vs. Hirsch, 8 Ore. 412, upholds two acts, one providing for the construction of a road in Grant and Baker counties, to be known as the Eastern Oregon-Winnemucca Road, the other for a road from Multnomah to Wasco County, along the Columbia River. After reviewing a great many authorities, the Court said:

> "The general principle to be derived from all the authorities seems to be this, that whenever an act of the legislature authorizes any public road or other internal improvement to be made or other act done which in its nature is more beneficial to the community at large than to the inhabitants in the immediate locality of the road or other internal improvement, such act is to be considered a public and not a special or local law."

The Court further says, referring to the road under consideration:

> "It is in no sense a local road. The advantages to the inhabitants living along the route or line of road are insignificant when compared with the benefits of the people at large, or at least to those residing in the two great sections before referred to, whenever the road shall be completed."

In Long v. State, 175 Ind. 17, 92 N.E. 653, it is held that the statute prescribing punishment for fishing with seines in any waters of the state except Lake Michigan, private ponds, and the Ohio or Wabash rivers, so far as they are boundary lines between the states of Indiana and Illinois, and making it unlawful to seine in such rivers within 100 yards of the mouth of any stream emptying into them from the Indiana side, does not violate Sec. 22, Art. 4, Const., prohibiting the passage of local laws for the punishment of crimes and misdemeanors. To the contention that the provisions making it unlawful to seine in certain waters renders the act local and void, the Court said:

> "If it be conceded that the act provides for the punishment of crimes and misdemeanors within the meaning of the Constitutional provision cited, it does not follow that it is (local and) invalid. Art. 4, Sec. 22, Const., does not preclude proper classification in legislation relating to the subjects therein enumerated, but does prohibit legislation which rests upon such arbitrary selection as renders the act local or special. Many of our penal statutes have exclusive application to special

localities or objects and are nevertheless general and unquestionably valid, because they rest upon an inherent and substantial basis of classification. *The purpose of the act under consideration manifestly was to protect and promote the supply of fish in the waters of this state.* The basis upon which the excepted class was formed is equally clear. Private ponds were excluded, since the fish therein are in a sense private property. The other waters are either partly or wholly beyond the boundaries of the state. It would be a vain thing to prohibit seining on the north side of the Ohio and on the east side of the Wabash, where they form state boundaries, when this mode of fishing was allowable on the opposite shores. The habit of fish to leave the larger rivers and ascend the smaller streams during certain seasons is well known.

"The prohibition against seining within a radius of 100 yards of the mouth of any Indiana stream emptying into the boundary rivers was clearly designed to prevent interruption or disturbance of the natural migration of fish from those rivers up the streams of this state. This was plainly within the objects of the act. The line defining the precise limit of classes must in most cases be in a sense arbitrary. The legislature had full power over the subject-matter of this legislation, and in making the exceptions contained in the act, there is no evidence of bad faith or purely arbitrary action. In view of the size of the boundary rivers, we cannot say that the 100 yard limit from the mouth of tributary streams is not reasonably calculated to subserve the legislative purposes. It is our conclusion, therefore, that the statute does not contravene Art. 4, No. 22, Const."

So, in Gentile v. State, 29 Ind. 409, it was held that an act for the protection of fish for a

certain period in any of the lakes, rivers, or small streams of the state was not within the constitutional prohibition against local legislation.

And following the ruling of Gentile v. State, supra., the same statute was held constitutional in State v. Boone, 30 Ind. 225, and Stuttsman v. State, 57 Ind. 119.

It is held in State v. Hanlon, 77 Ohio St. 19, 13 L. R. A. (N. S.) 539, 122 Am. St. Rep. 472, 82 N. E. 662, that a statute, in so far as it enacts that every person, firm, or corporation desiring to engage in fishing in the waters of Lake Erie and the estuaries and bays thereof within the state shall make application to the commissioners of fish and game, and obtain a license or authority so to do, and for such license or authority shall pay the fee therein specified, is a valid enactment, and is neither in violation of the 14th Amendment of the Federal Constitution, nor repugnant to Sec. 26, Art. 2, of the state constitution, which provides, that all laws of a general nature shall have a uniform operation throughout the state. The Court said that, it being matter of public and common knowledge that reasons may and do exist for imposing conditions and restrictions upon persons engaged in fishing with nets in the waters of Lake Erie, that do not apply to or exist as to other waters of the state, such enactment would be valid law, and not in conflict with Sec. 26 Art. 2, of the state constitution.

Constitutional inhibitions like those of the aforementioned Act of 1886 are found in the constitutions of many of the states—perhaps in most of the states; but such provisions have not been considered as interfering with the power of a state legislature to enact game and fish regulations which prescribe different rules for the different districts within the same state.

The Constitution of Oregon (Sec. 23 Art. IV) provides:

"The legislative assembly shall not pass special or local laws*****for the punishment of crimes and misdemeanors."

Under that constitution the State of Oregon has from the earliest days followed the system of enacting separate regulations for the several fishing grounds, and denounced the violation of these regulations as crime.

Sections 7432 to 7474 Olson's Oregon Laws are devoted to the establishment of zoning systems for migratory fish, and Sections 7564 to 7602 are devoted to a similar system for oysters, clams, crabs and crawfish.

Sections 2310, 2316 and 2317 of the same compilation are part of the penal code of Oregon and are devoted to provide punishments for fishing unlawfully in various streams mentioned by name and as such segregated from the rest of the country.

Under these Oregon laws, what is a crime in one part of the state is not a crime in another part of the state.

That these enactments are "for the punishment of crimes and misdemeanors" in contemplation of the Constitution of Oregon is settled by the Supreme Court of that state in Lewis vs. Varney, 85 Ore. 402, (167 Pac. 271). In that case the Court held that a law providing a license tax for dogs to be collected by the constables in the several counties was void, as in conflict with the constitutional provisions above mentioned, because the law applied only to some counties in the state and not to all.

The principle of law adduced from the foregoing decision must be applied to the case at bar in light of the characteristics and habits of the species of fish to which the law applies and in light of the character of the great industry intended to be protected.

The Alaska salmon is not a matter for local consumption. It has become a very common food for humanity generally, not only throughout the United States, but the world. The law in question does not affect a local community alone, nor the entire Territory alone.—It affects the entire country.

It is notorious that the five species of salmon which frequent the waters of Alaska and of British Columbia, propagate in the rivers and lakes of Alaska, going to sea at an early age, becoming

the property of humanity generally, and return to the parent stream for spawning.

The salmon run each season commences early in the year in the waters laving Alaska Peninsula and opens gradually later as one goes easterly and southeasterly along the coast of the Territory. The season is closed before the middle of July in Bristol Bay and at the peninsular points, but does not close in the southeastern part of the Territory till the last days of September.

The salmon industry is carried on principally by corporations financed and managed outside of the Territory, and the fishing itself is done to a large etxent by people from the states. The protection of salmon in the waters of southeastern Alaska present quite different problems from those with which the authorities have to deal along the west coast. In Southeastern Alaska there are thousands of salmon streams all emptying into coves, bays or narrow inlets where illegal fishing at the mouths of the streams is extremely difficult to detect, and where the enforcement of the law prohibiting fishing at the mouth of the streams has been found impossible. It was for this reason that it was thought advisable to prohibit fishing entirely for ten days during the particular period of the season when the best varieties of salmon school before the mouths of the streams ready to enter. In as much as the seasons differ in the different waters of Southeastern Alaska, the zoning system was adopted as neces-

sary in order to carry out the purpose of the law.

Conditions along the rest of the Alaskan coast are quite different. In those places the leading salmon streams enter, as a rule, into the open ocean where the opportunity to detect violation of the law is comparatively easy.

The statute here in question comes clearly within the general principle laid down in the authorities here cited to the effect that the law is not "local" in contemplation of constitutional inhibition where it affects all the people alike and where it is aimed at an evil which affects all the people alike irrespective of place of residence.

The vital fact is that the statute here in question is designed for and does protect and preserve the salmon industry along the entire coast and for the benefit of all the people no matter where they reside or where they fish.

It may not be amiss at this time to call attention to the historic fact that it has been, and to a limited extent it still is the custom in the states bordering along the Atlantic coast for a state legislature to delegate power to the local municipalities to regulate fishing within their own respective jurisdictions.

Commonwealth vs. Hilton, 174 *Mass.* 29;
Swift vs. Falmouth 167 *Mass.* 115;
State vs. Nelson 31 *R. I.* 264;
Yarmouth vs. Skillingo 45 *Me.* 133;
Southport vs. Ogden 23 *Conn.* 128;
Smith vs. Levinus 8 *N. Y.* 472.

While this system of legislation was for a long time almost the exclusive regulation of the fisheries, it has become objectionable and has generally given way to general state regulation.

Is it not probable that it was this form of local legislation Congress had in mind when the clause prohibiting local fish legislation was inserted into the Act of 1886? Such inhibition by Congress upon the power of the territories would be in harmony with the spirit of the times. To hold that it was the intent of Congress to prohibit legislatures from enacting regulations which applied equally to all waters at all times would be to effectively prevent both practical protection and practical utilization of the fishing grounds.

The requirement of equality in the operation of a statute is not infringed by legislative classfication of persons or things. This requirement only makes it necessary that the same means and methods be applied impartially to all the constituents of a class so that the law shall operate equally and uniformly upon all persons in similar circumstances. Thus dividing of the waters into zones may be necessary to equalize the operation of the law.

The requirement of equality does not prohibit legislation which is limited either in the objects to which it is directed or by the territory in which it is to operate.

Richmond R. Co. vs. Richmond 96 *U. S.* 521;

Carlton vs. Johnson, 61 *Fla.* 975;

In the Richmond case the Supreme Court said:

> "All laws should be general in their operation, but all places within the same city do not necessarily require the same local regulation. While locomotives may with very great propriety be excluded from one street or even from one part of a street, it would be sometimes unreasonable to exclude them from all. It is a special duty of the city authorities to make necessary discrimination in this particular."

On exactly the same theory city ordinances are not held special or local because they provide fire limits, sewer districts, or create zones where buildings of only a certain character are permitted, or zones within which certain industries are prohibited. Nor is it illegal for a state or municipality to enact road regulations which permit higher speed in some localities than in others.

If the law here in question had provided that it should be unlawful to fish salmon between certain dates in waters where the height of the run occurs on the 10th of August, and that it should be unlawful to fish salmon between certain other dates in any waters of the Territory where the height of the salmon run occurs on the 20th of August, no objection would have been made to the law on the ground that it was local in its application. But if the law had been thus worded every trial of its infraction would have resulted in a swearing match between fish experts as to the exact date of the salmon run. The legislature

undertook to settle the question in advance. It determined the period of the run in the various sections of the inland waters, so called, of Southeastern Alaska, and has created the zones in conformity with that determination.

The Act of June 9th, 1896, excepts certain areas from the operation of that law. The same is true of the Act of June 26th, 1906.

The Federal game laws of Alaska divided the Territory into zones or districts. Sections 331 and 334 C. L. A.

Alaska is continental in extent. It stretches through 18 degrees of latitude and 45 degrees longitude and has a coast line of 25,000 miles, or five times as much as the United States exclusive of Alaska. It has an area almost equal to all the United States east of the Mississippi River and has a climate that varies from sub-tropical to arctic. Congress had found it impossible to make either fish laws or game laws for this domain without a zoning system, and it is not to be thought that Congress considered the local legislature possessed of greater astuteness.

The provisions of the Act of 1886 were not intended as pedagogic requirements to do the impossible. They were enacted by reasonable men for reasonable men.

Respectfully submitted,

JOHN RUSTGARD,

Attorney-General of Alaska,

Appearing as Amicus Curiae.

No. 4247

United States

Circuit Court of Appeals

For the Ninth Circuit.

CHARLES WEDEL,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Northern Division of the United States District Court of the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

For CHARLES WEDEL, Plaintiff in Error:
MORRIS OPPENHEIM and BENJ. I. BLOCH, Phelan Building, San Francisco, Calif.

For the UNITED STATES, Defendant in Error:
JOHN T. WILLIAMS, U. S. Attorney, Post-office Bldg., San Francisco, Calif.

In the Northern Division of the United States District Court for the Northern District of California, Third Division.

IN EQUITY—No. 106.

UNITED STATES OF AMERICA,
Complainant,

vs.

CHARLES WEDEL et al.,
Defendants.

INFORMATION IN CHANCERY.

The United States of America by John T. Williams, United States Attorney for the Northern District of California, and Garton D. Keyston, Assistant United States Attorney, represents to your Honor as follows:

That the above-entitled action was commenced on the 27th day of January, 1923, by the filing of

a bill in equity in the office of the Clerk of the United States District Court for the Northern District of California, Northern Division, in the name of and on behalf of the United States by John T. Williams, Esq., United States Attorney and Garton D. Keyston, Esq., Assistant United States Attorney for the Northern District of California, seeking to abate and enjoin a certain common and public nuisance, namely, the violation of Section 21 of Title II of the Act of Congress of October 28, 1919, known as the National Prohibition Act which was then and there alleged to exist in a certain hotel, known and designated as the "Speedway Hotel," in the city of Cotati, county of Sonoma, State of California, and more particularly described as follows, to wit:

> "BEGINNING at the Northwest corner of Lot No. 12 in Block No. 4 of Subdivision No. 6 of the Cotati Rancho as designated on the plat of said subdivision filed in the office of the County Recorder of Sonoma County on the Seventh day of June, 1893, thence [1*] Southerly along the line between lots 12 and 13, 50 feet to the Northwest corner of lot No. 11, thence Easterly along the line between lots 11 and 12, 21 feet; thence Northerly and parallel to the Westerly line of said Lot 12, 50 feet to the Northerly line of said Lot 12; thence Westerly along the Northerly line of said lot 12, 21 feet, to the point of beginning. Being the Westerly 21 feet of said Lot No.

*Page-number appearing at foot of page of original Certified Transcript of Record.

12, in Block No. 4 of the Subdivision No. 6, Cotati Rancho." Recorded June 7, 1918, in Liber 359 of Deeds, on page 462. On June 14, 1922, John Chaney deeded this piece to Walter S. Woolery and wife, by deed recorded June 14, 1922, in Liber 19 of Official Records, page 8."

Said bill in equity alleges that the defendant Charles Wedel is the owner of the said real property and buildings situated on said property and that the defendant Charles Wedel was the owner of the business conducted on the said premises and that the said nuisance and the violation of the said Act of Congress of October 28, 1919, consisted in the use and maintenance of the said premises as a place where intoxicating liquors containing more than one-half of one per cent or more of alcohol by volume and fit for use for beverage purposes were manufactured, sold, kept or bartered.

That upon the filing of the said bill in equity as aforesaid, a subpoena was duly issued by the said United States District Court for the Northern District of California directed to the said defendants herein.

That on the 31st day of January, 1923, and subsequent to the filing of said bill in equity herein, the Honorable William C. Van Fleet, Judge of the United States District Court for the Northern District of California, upon affidavit showing the violation of said Act upon said premises made an order that a temporary writ of injunction should issue restraining and enjoining the defendants,

their agents, servants, representatives, managers, employees, and all others as prayed for in said bill of complaint; that in pursuance of such an order a temporary writ of injunction was issued on the 31st day of January, 1923, by the Clerk of said Court and under the seal of said Court; that the [2] said order and said temporary writ of injunction and each of them contain the following provisions:

> "Pending the final hearing and determination of the trial of the above-entitled action, you and each of you, your agents, servants, representatives, managers and employees and all others are restrained and enjoined from manufacturing, keeping, selling or bartering any intoxicating liquor as defined in Section 1 of Title II of the Act of October 28, 1919, to wit, the National Prohibition Act in or upon the premises described in the Bill of Complaint wherein said nuisance is alleged to exist, and from removing or in any way interfering with the liquor, furniture and fixtures or other things in or upon said premises used, kept or maintaining in or in connection with the manufacturing, selling, keeping or bartering of such liquor, and from conducting or in any way permitting the continuance of a common and public nuisance upon said premises."

That as appears on the marshal's return on file in the above-entitled action said subpoena and said temporary writ of injunction were personally

served upon Charles Wedel, on the 20th day of February, 1923, and subsequent to the filing of said bill in equity herein, the Honorable William C. Van Fleet, Judge of the United States District Court for the Northern District of California, made an order for posting of temporary writ of injunction upon said premises, and pursuant to said Order two certified copies of said temporary writ of injunction were posted upon said premises in two conspicuous places on the 20th day of February, 1923, as appears by said marshal's return on file herein.

That according to the affidavit of C. W. Ahlin, Federal Prohibition Agent in the employ of the Government of the United States and acting as such in the capacity of the Federal Prohibition Agent in the Department and under the direction of the United States Commissioner of Internal Revenue and Federal Prohibition Director in and for the State of California attached hereto and marked Exhibit "A" and made a part of this petition as if the same were set forth herein in full, Charles Wedel on the 20th day of January, 1924, in violation of the provisions of said Temporary Writ of Injunction hereinbefore set forth, [3] continued or permitted a continuance of the common nuisance in the said premises above described by selling intoxicating liquor containing one-half of one per cent or more of alcohol by volume and fit for use for beverage purposes, to wit, whiskey;

Your petitioner is informed and believes that Charles Wedel is the proprietor of the business

conducted upon the said premises and therefore alleges: That Charles Wedel had knowledge of the temporary writ of injunction heretofore mentioned because of the posting of the said temporary writ of injunction upon the said premises by the United States Marshal as hereinbefore stated.

Your petitioner, therefore, prays for the issuance by this Court or by a Judge thereof, of a warrant for the arrest of said Charles Wedel, to the end that the defendants may be summarily tried and punished for said wilful violation of the temporary writ of injunction above referred to and filed herein as hereinbefore set forth as provided by Section 21 of Title II of said National Prohibition Act.

JOHN T. WILLIAMS,
United States Attorney.
GARTON D. KEYSTON,
Asst. United States Attorney. [4]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Garton D. Keyston, being first duly sworn, deposes and says:

That he has read the foregoing information chancery and knows the contents thereof and that the facts stated therein are true of his own knowledge except as to those matters as are therein stated upon his information or belief and as to those matters he believes it to be true; that the source of his information and belief are investigations made by him in his official capacity and inter-

views with C. W. Ahlin, Federal Prohibition Agent in the Department and under the direction of the United States Commissioner of Internal Revenue and Federal Prohibition Director in and for the State of California, located at and in the City and County of San Francisco, State of California, whose affidavit is hereto annexed.

GARTON D. KEYSTON.

Subscribed and sworn to before me this 26th day of February, 1924.

[Seal] WALTER B. MALING,
Clerk, U. S. District Court, Northern District of California. [5]

EXHIBIT "A."

In the Northern Division of the United States District Court for the Northern District of California, Third Division.

IN EQUITY—No. ——.

UNITED STATES OF AMERICA,
Complainant,

vs.

CHARLES WEDEL, JOHN DOE, RICHARD ROE, MARY DOE and MARY ROE,
Defendants.

United States of America,
[Seal] Northern District of California,
City and County of San Francisco,—ss.

C. W. Ahlin, being first duly sworn, deposes and says:

That he is and at all times herein mentioned was, in the employ of the government of the United States and acting as such in the capacity of Federal Prohibition Agent in the Department and under the direction of the United States Commissioner of Internal Revenue and Federal Prohibition Director in and for the State of California located at and in the city and county of San Francisco, State of California; affiant further says that on the 20th day of January, 1924, A. D., at about the hour of —— o'clock, P. M. said affiant entered the hotel and cafe known as and called Speedway Hotel, then and there located at Cotati, in the said city of Cotati, County of Sonoma, State of California, which said hotel and cafe is located on the premises described in the bill of equity to which this affidavit is attached and which said premises are located in said city of Cotati, county of Sonoma and State of California; affiant further says that said premises at all the times herein mentioned were and now are equipped as a hotel and cafe with table, chairs and such other equipment as is ordinarily and commonly used in a hotel and cafe in the said city of Cotati, County of Sonoma, State of California; and affiant then and there asked for and received of and from the waiter then and there in possession, charge and control of the said premises and said waiter being then and there serving in said premises, four drinks of whiskey on the above date then and there containing one-half of one per cent or more of alcohol and fit for use and used by affiant for beverage purposes, and said

waiter then and there sold said four drinks of whiskey to affiant for [6] beverage purposes, and affiant then and there drank a portion of said whiskey upon the premises at said time, and the said waiter charged affiant and affiant paid said waiter the sum of Two Dollars ($2.00) for said four drinks of whiskey and the name of the waiter serving said four drinks of whiskey is known to affiant to be Charles Wedel.

C. W. AHLIN.

Subscribed and sworn to before me this 26th day of February, 1924.

[Seal] WALTER B. MALING,
Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed Feb. 28, 1924. Walter B. Maling, Clerk. By F. M. Lampert, Deputy Clerk. [7]

United States of America,
State of California,—ss.

In the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 106.

UNITED STATES OF AMERICA,
Complainant,

vs.

CHARLES WEDEL, JOHN DOE, RICHARD ROE, MARY DOE and MARY ROE,
Defendants.

ORDER FOR TEMPORARY WRIT OF INJUNCTION.

AND NOW, on this 31st day of January, 1923, A. D. this cause comes on to be heard upon the bill of complaint of complainant heretofore filed in the office of the Clerk of this Court, and upon the affidavits of G. L. Budd and C. A. Budd, duly filed in open court, and it appearing to the satisfaction of the Court by inspection of the bill of complaint and said affidavits, and otherwise, that a nuisance exists as set out and described in said bill of complaint, on the premises therein mentioned, described and referred to

IT IS THEREFORE AND HEREBY ORDERED THAT, pending the final hearing and determination of the trial of the above-entitled action, the defendants above named and each of them, their agents, servants, representatives, managers and employees and all others are restrained and enjoined from manufacturing, keeping, selling or bartering any intoxicating liquor as defined in Section 1 of Title II, of the Act of October 28, 1919, to wit, the "National Prohibition Act" in or upon the premises described in the Bill of Complaint wherein said nuisance is alleged to exist, and from removing or in any way interfering with the liquor, furniture and fixtures or other things [8] in or upon said premises used, kept or maintained in or in connection with the manufacturing, selling, keeping or bartering of such liquor, and from conducting or in any way permitting the

continuance of a common and public nuisance upon said premises.

It is further ordered that a temporary writ of injunction issue in accordance herewith.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Jan. 31, 1923. Walter B. Maling, Clerk. By Thomas J. Franklin, Deputy Clerk. [9]

In the Northern Division of the United States District Court, for the Northern District of California, Second Division.

IN EQUITY—No. 106.

UNITED STATES OF AMERICA,
Complainant,

vs.

CHARLES WEDEL, JOHN DOE, RICHARD ROE, MARY DOE and MARY ROE,
Defendants.

WRIT OF INJUNCTION.

The President of the United States of America, To Charles Wedel, John Doe, Richard Roe, Mary Doe and Mary Roe, GREETING:

WHEREAS, on the 31st day of January, 1923, an order was made and entered in the above-entitled suit wherein and whereby the above-named defendants and each of them, their and each of their lessees, grantees, servants, agents, subordi-

nates and employees, and each of them, and all others, were enjoined from doing any of the acts and or things as set forth in said order:

NOW, THEREFORE, in accordance with the terms of said ORDER,

We hereby command and strictly enjoin you, the said defendants, Charles Wedel, John Doe, Richard Roe, Mary Doe and Mary Roe, that until further order of the above-named court, you and each of you, your agents, servants, representatives, managers and employees and all others are restrained and enjoined from removing, disfiguring or in any way covering up or interfering with any certified copies of any writ or order issued in the above-entitled action and posted in or upon the following described premises, to wit:

Being the hotel known and designated as Speedway Hotel in the city of Cotati, county of Sonoma, State of California, and which said hotel and the place where the common and public nuisance is being conducted is also known as the "Speedway Hotel" and being located upon and being a portion of that certain lot, piece or parcel of land, described as follows, to wit: [10]

BEGINNING at the Northwest corner of Lot No. 12 in Block No. 4 of Subdivision No. 6 of the Cotati Rancho as designated on the plat of said Subdivision filed in the office of the County Recorder of Sonoma County on the Seventh day of June, 1893, thence Southerly along the line between lots 12 and 13, 50 feet to the Northwest corner of lot No. 11, thence Easterly along the line between lots 11 and 12, 21 feet; thence

Northerly and parallel to the Westerly line of said lot 12, 50 feet to the Northerly line of said lot 12; thence Westerly along the Northerly line of said lot 12, 21 feet to the point of beginning. Being the Westerly 21 feet of said Lot No. 12 in Block No. 4 of Subdivision No. 6, "Cotati Rancho." Recorded June 7, 1918, in Liber 359 of Deeds, on page 462. On June 14, 1922, John Chaney deeded this piece to Walter S. Woollery and wife by deed recorded June 14, 1922, in Liber 19 of Official Records page 8.

WITNESS, the Honorable WILLIAM C. VAN FLEET, Judge of the said District Court, this 31st day of January, A. D. 1922, and of our Independence the 147th.

[Seal] WALTER B. MALING,
Clerk.
By Thomas J. Franklin,
Deputy Clerk. [11]

RETURN ON SERVICE OF WRIT.

United States of America,
Northern District of California—ss.

I hereby certify and return that I served the annexed Writ of Injunction on the therein-named Charles Wedel by handing to and leaving a true and correct copy thereof with Charles Wedel personally at Cotati, Calif., in said District on the 10th day of Feby., A. D. 1923.

J. B. HOLOHAN,
U. S. Marshal.
By Fred S. Field,
Deputy.

[Endorsed]: Filed Feb. 20, 1923. Walter B. Maling, Clerk. By Thomas J. Franklin, Deputy Clerk. [12]

In the Northern Division of the United States District Court for the Northern District of California, Third Division.

IN EQUITY—No. 106.

UNITED STATES OF AMERICA,

Complainant,

vs.

CHARLES WEDEL et al.,

Defendants.

ORDER FOR ATTACHMENT.

On reading and filing the information in chancery in the above-entitled cause, together with the affidavit of C. W. Ahlin attached thereto, and it appearing that Charles Wedel has violated the temporary injunction issued on the 31st day of January, 1923, by the Clerk of this Court and under the seal of this court, now on motion of Garton D. Keyston, Esq., Assistant United States Attorney, one of the attorneys for the complainant above named,

IT IS HEREBY ORDERED AND DIRECTED that a warrant of attachment as for a contempt for disobedience of said temporary injunction be issued to the United States marshal for the Northern Division of the Northern District of California, against the said Charles Wedel, and that the said warrant of attachment be returnable forthwith.

AND IT IS FURTHER ORDERED that the said Charles Wedel, upon the return on said warrant of attachment, show cause, if any he has why he should not be punished for contempt of court in violating the said temporary injunction. Bond $1000.

Dated: Feb. 26, 1924.

BOURQUIN,
United States District Judge.

[Endorsed]: Filed Feb. 28, 1924. Walter B. Maling, Clerk. By F. M. Lampert, Deputy Clerk. [13]

In the Northern Division of the United States District Court for the Northern District of California, Third Division.

IN EQUITY—No. 106.

UNITED STATES OF AMERICA,
Complainant,

vs.

CHARLES WEDEL et al.,
Defendants.

ATTACHMENT WRIT.

United States of America,
Northern District of California,—ss.

The President of the United States of America,
To the United States Marshal for the Northern District of California and to His Deputies or Any or Either of Them.

You are hereby commanded to arrest Charles

Wedel, and have his body before me at the court-room of the above-entitled court forthwith to answer for an alleged contempt in violating the temporary injunction heretofore on the 31st day of January, 1923, issued in the above-entitled cause and further to abide and perform such order as the Court shall then and there make, whereof fail not; and have you then and there return of this attachment with your doings thereon endorsed.

WITNESS, the Honorable GEORGE M. BOURQUIN, Judge of the said District Court, this 28th day of February, A. D. 1924, and of our Independence the 148th.

WALTER B. MALING,
Clerk.
By F. M. Lampert,
Deputy Clerk. [14]

UNITED STATES MARSHAL'S RETURN.

I hereby certify and return that I received the within Writ at San Francisco, California, on March 5th, 1924, and executed the same by apprehending the within-named respondent Charles Wedel at Cotati, Sonoma County on March 5th, 1924, and placed him in the county jail of Sonoma County at Santa Rosa, California, on the same day.

And that on March 6th, 1924, I produced the said Charles Wedel before the United States District Court at Sacramento, California, as I am commanded herein to do.

FRED L. ESOLA,
U. S. Marshal, Northern District of California.
By Jno. J. Donnelly,
Salaried Deputy.

[Endorsed]: Filed Mar. 8, 1924. Walter B. Maling, Clerk. By F. M. Lampert, Deputy Clerk. [15]

Tuesday, March 18, 1924.

Court met pursuant to adjournment and was duly opened for the transaction of business.

Present: The Honorable JOHN S. PARTRIDGE, District Judge; WALTER B. MALING, Clerk; FRED L. ESOLA, U. S. Marshal; EDWARD DRYDEN, Bailiff; J. F. McDONALD, Asst. U. S. Attorney.

No. 106.

UNITED STATES

vs.

CHARLES WEDEL.

MINUTES OF COURT—MARCH 18, 1924—TRIAL.

J. Fred McDonald, Esq., Assistant U. S. Attorney, and the respondent, Charles Wedel, with his attorney, Morris Oppenheim, Esq., being present in open court, the hearing on the charge of contempt came on. Thereupon attorney for respondent moved to dismiss the temporary writ of injunction and information and, after arguments, said motion being submitted and fully considered, ORDERED said motion be and the same is hereby denied. The respondent was arraigned upon the information herein and entered his plea of not

guilty. The Government introduced in support of the charge the affidavit heretofore filed and the defendant offered no evidence. The Court found the respondent, Charles Wedel, guilty, and ordered that the respondent be imprisoned for a period of six (6) months in the county jail, Sonoma County, California, and pay a fine in the sum of Five Hundred ($500.00) Dollars, or in default of the payment of said fine that he be further imprisoned for a period of five (5) months in said county jail.

FURTHER ORDERED that motion for ten-day stay of execution to prepare appeal be granted, and bond on stay of execution fixed in the sum of One Thousand ($1000.00) Dollars. [16]

In the Northern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 106.

UNITED STATES OF AMERICA,
Complainant,

vs.

CHARLES WEDEL, JOHN DOE, RICHARD ROE, MARY DOE, and MARY ROE,
Defendants.

PETITION FOR WRIT OF ERROR.

Comes now the above-named Charles Wedel and says, that on the 18th day of March, 1924, judg-

ment was entered by this court against the said Charles Wedel, and on the said 18th day of March, 1924, said judgment became final; that the said Charles Wedel was and is agreed in that, in said judgment and the proceedings had prior thereto in this case certain errors were committed to his prejudice; that this is a suit in equity brought under and by virtue of section 22 of Title II of the Act of Congress of October 28th, 1919, known as the "National Prohibition Act" and for the purpose of enjoining a certain public and common nuisance; pending the final hearing and determination of the trial of the above-entitled action a writ of injunction was issued out of this court enjoining the defendants from manufacturing, keeping, selling or bartering any intoxicating liquor as defined in said "National Prohibition Act"; that thereafter said Charles Wedel was cited for the alleged contempt in violating the said writ of injunction, and was convicted by the said Court of said contempt, and judgment was duly entered herein; that the judgment and decision of this Court is against the rights claimed by the said Charles Wedel, and as he believes contrary to the Constitution of the United States of America, and contrary to the law [17] relating to the said abatement of nuisances, all of which will more fully appear in detail in the assignment of errors filed herein.

WHEREFORE said Charles Wedel prays that the writ of error may issue to the United States Circuit Court of Appeals for the Ninth Circuit, for the correcting of the error complained of, and

that a duly authenticated transcript of the record, proceedings, and papers herein may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

MORRIS OPPENHEIM,
BENJAMIN I. BLOCH,
Attorneys for Charles Wedel.

[Endorsed]: Filed Mar. 25, 1924. Walter B. Maling, Clerk. By F. M. Lampert, Deputy Clerk. [18]

In the Northern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 106.

UNITED STATES OF AMERICA,
Complainant,

vs.

CHARLES WEDEL, JOHN DOE, RICHARD ROE, MARY DOE and MARY ROE,
Defendants.

ALLOWANCE OF A WRIT OF ERROR.

Comes now Charles Wedel, the plaintiff in error above named, on this 25th day of March, 1924, and files and presents to this court his petition for the allowance of a writ of error intended to be urged by him and praying further that a duly authenticated transcript of the records, proceedings and papers upon which the judgment was rendered

may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had in the premises as may be just and proper, and upon the consideration of the said petition this court desiring to give petitioner an opportunity to test in the United States Circuit Court of Appeals for the Ninth Circuit the questions herein presented, it is ordered by this court that a writ of error be allowed as prayed, provided however that the said Charles Wedel, plaintiff in error, give bond in the sum of One Thousand ($1000.00) Dollars, which bond shall operate as a bail bond on appeal.

In testimony whereof witness my hand this 25th day of March, 1924.

JOHN S. PARTRIDGE,
District Judge.

[Endorsed]: Filed Mar. 25, 1924. Walter B. Maling, Clerk. By F. M. Lampert, Deputy Clerk. [19]

In the Northern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 106.

UNITED STATES OF AMERICA,
Complainant,

vs.

CHARLES WEDEL, JOHN DOE, RICHARD ROE, MARY DOE, and MARY ROE,
Defendants.

ASSIGNMENT OF ERRORS.

Comes now Charles Wedel, the plaintiff in error, in the above-entitled cause, and avers and shows that in the record and proceedings in the said cause, the District Court in and for the Northern Division of the Northern District of California, Second Division, erred to the grievous injury and wrong of the plaintiff in error herein, and to the prejudice and against the rights of said plaintiff in error in the following particulars, to wit:

1. That the Court erred in denying the motion of the plaintiff in error to dismiss the citation against said plaintiff in error for contempt in the alleged violation of said writ of injunction.

2. That the Court erred in denying the motion of said plaintiff in error to dismiss all proceedings had under said citation for contempt.

3. That the Court erred in finding said plaintiff in error guilty of contempt in the alleged violation of said writ of injunction.

4. That the judgment of, and fine and imprisonment imposed upon said plaintiff in error, is void and in violation of the Constitution of the United States of America and contrary to law.

WHEREFORE for these and other manifest errors appearing on the record, the said Charles Wedel, plaintiff in [20] error, prays that the said judgment of the Northern Division of the United States District Court for the Northern District of California, Second Division, be reversed and set aside, and held for naught, and

that judgment be rendered for plaintiff in error granting him his rights under the Constitution and laws of the United States, and plaintiff in error also prays for his costs.

MORRIS OPPENHEIM,
BENJAMIN I. BLOCH,
Attorneys for Plaintiff in Error, Charles Wedel.

[Endorsed]: Filed Mar. 25, 1924. Walter B. Maling, Clerk. By F. M. Lampert, Deputy Clerk. [21]

In the Northern Division of the United States District Court for the Northern District of California, Northern Division.

IN EQUITY—No. 106.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHARLES WEDEL, JOHN DOE, RICHARD ROE, MARY DOE and MARY ROE,
Defendants.

APPEAL BOND.

KNOW ALL MEN BY THESE PRESENTS: That I, Charles Wedel as principal, am held and firmly bound and acknowledge myself to owe the United States of America the sum of One Thousand ($1000) Dollars to be levied on certain Liberty Bonds deposited this day with the United States Commissioner for the Northern District of Cali-

fornia, Northern Division at Sacramento, to which payment well and truly to be made, I join myself, my heirs, executors and administrators by these presents.

Sealed with my seal and dated this 18th day of March in the year of our Lord one thousand nine hundred and twenty-four.

Whereas lately, to wit: on the 18th day of March, 1924, in the District Court of the United States for the Northern District of California, Northern Division, in a suit pending in said court between the United States of America, plaintiff, and Charles Wedel, defendant, a judgment and sentence was rendered against the said Charles Wedel, and the said Charles Wedel has been granted one week from the date hereof, to prefer an appeal and to obtain a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment and sentence in the aforesaid suit, and to obtain a citation directed to the United States of America citing and admonishing the United States of America to be and appear in [22] the United States Circuit Court of Appeals for the Ninth Circuit at the city of San Francisco, California, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such that if the said Charles Wedel shall appear either in person or by attorneys in the United States Circuit Court of Appeals for the Ninth Circuit on such a day or days as may be appointed for the hearing of said cause in said court and

prosecute his said writ of error and shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit in the said cause, and shall surrender himself in the execution of the judgment and sentence appealed from, as said court may direct, if the judgment and sentence against him shall be affirmed or the writ of error or appeal is dismissed; and if he shall appear for sentence or for the execution of the judgment and sentence hereinbefore imposed in the District Court of the United States in and for the Northern District of California, Northern Division, on such day or days as may be appointed for retrial, or the execution of the said judgment and sentence by the said District Court and abide by and obey all orders made by the said court provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, then the above obligation is to be void; otherwise to remain in full force, virtue and effect.

CHAS. H. WEDEL, (Seal)
Address: Cotati, Cal.

Signed, sealed and acknowledged before me and approved this 18th day of March, 1924.

[Seal] QUINCY BROWN,
United States Commissioner for the Northern District of California, at Sacramento.

[Endorsed]: Filed Mar. 19, 1924. Walter B. Maling, Clerk. By F. M. Lampert, Deputy Clerk. [23]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 23 pages, numbered from 1 to 23, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of United States of America vs. Charles Wedel, et al., No. 106—In Equity, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript of record filed in said case.

I further certify that the cost of preparing and certifying the foregoing transcript on writ of error is the sum of Six and 25/100 ($6.25) Dollars, and that the same has been paid to me by the attorney for the plaintiff in error herein.

Annexed hereto are the original writ of error, return to writ of error and the original citation on writ of error.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court, this 21st day of April, A. D. 1924.

[Seal] WALTER B MALING,
Clerk.
By F. M. Lampert,
Deputy Clerk. [24]

In the Northern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 106.

UNITED STATES OF AMERICA,
Complainant,

vs.

CHARLES WEDEL, JOHN DOE, RICHARD ROE, MARY DOE and MARY ROE,
Defendants.

WRIT OF ERROR.

United States of America,—ss.

The Honorable CALVIN COOLIDGE, President of the United States of America: To the Honorable Judge of the Northern Division of the United States District Court, for the Northern District of California, Second Division, GREETING:

Because in the records and proceedings and also in the rendition of a judgment before you at Sacramento, California, on the 18th day of March, 1924, between the United States of America, plaintiff, and Charles Wedel, defendant, a manifest error has happened to the great damage of the said Charles Wedel, as by his petition for a writ of error he alleges, we, willing that error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf do command you, if judgment be therein given

that then under your seal, distinctly and openly you send the records and proceedings aforesaid and all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ so that you have the said records and proceedings aforesaid at the city of San Francisco, California, and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit on or before the 25th day of May, 1924, to the end that the record [25] and proceedings aforesaid being inspected by the United States Court of Appeals may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 25th day of March, 1924.

Issued at office in Sacramento, California, with the seal of the Northern Division of the United States District Court for the Northern Division of California, Second Division, and dated as aforesaid.

[Seal] WALTER B. MALING,
Clerk of the Northern Division of the United States District Court of the Northern District of California, Second Division.

By F. M. Lampert,
Deputy Clerk.

This writ allowed by

JOHN S. PARTRIDGE,
Judge.

I hereby certify that a copy of the within writ of error was on the 25th day of March, 1924, lodged in the office of the Clerk of the said United States District Court, for the Northern District of California, Northern Division, for said defendants in error.

[Seal] WALTER B. MALING,
Clerk of the District Court of the United States for the Northern District of California,
By F. M. Lampert,
Deputy Clerk.

[Endorsed]: No. 106—In Equity. In the Northern Division of the United States District Court for the Northern District of California, Second Division. United States of America, Complainant, vs. Charles Wedel, John Doe, Richard Roe, Mary Doe and Mary Roe, Defendants. Writ of Error. Filed Mar. 25, 1924. Walter B. Maling, Clerk. By F. M. Lampert, Deputy Clerk. [26]

RETURN TO WRIT OF ERROR.

The answer of the Judges of the District Court of the United States for the Northern District of California to the within writ of error.

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals for the

Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this writ was on the 25th day of March, A. D. 1924, duly lodged in the case in this court for the within named defendants in error.

By the Court:

[Seal] WALTER B. MALING,

Clerk U. S. District Court, Northern District of California, Northern Division.

By F. M. Lampert,
Deputy Clerk. [27]

In the Northern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 106.

UNITED STATES OF AMERICA,
Complainant,

vs.

CHARLES WEDEL, JOHN DOE, RICHARD ROE, MARY DOE and MARY ROE,
Defendants.

CITATION ON WRIT OF ERROR.

United States of America,—ss.

The United States of America, GREETINGS:

You are hereby cited and admonished to be and appear in the United States Court of Appeals for the Ninth Circuit at the city of San Francisco,

California, sixty (60) days from and after the date this citation bears date, pursuant to a writ of error filed in the Clerk's Office of the Northern Division of the United States District Court, in and for the Northern Division of California, Second Division, wherein Charles Wedel is plaintiff in error, and you are defendant in error, to show cause if any there be, why the said judgment and sentence rendered against the said Charles Wedel, plaintiff in error, as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf;

WHEREAS lately at the March term, 1924, of the Northern Division of the United States District Court for the Northern District of California, Second Division, the Honorable JOHN S. PARTRIDGE has heretofore set his hand on the 25th day of March, 1924.

JOHN S. PARTRIDGE,
Judge of the Northern Division of the United States District Court, in and for the Northern District of California, Second Division.

Due service of the within citation and receipt of copy thereof admitted this 25th day of March, 1924.

JOHN T. WILLIAMS,
United States Attorney.
By J. F. McDONALD,
Assistant United States Attorney.

[Endorsed]: No. 106—In Equity. In the Northern Division of the United States District Court for the Northern District of California, Second

Division. United States of America, Complainant, vs. Charles Wedel, John Doe, Richard Roe, Mary Doe and Mary Roe, Defendants. Citation on Writ of Error. Filed Mar. 25, 1924. Walter B. Maling, Clerk. By F. M. Lampert, Deputy Clerk. [28]

[Endorsed]: No. 4247. United States Circuit Court of Appeals for the Ninth Circuit. Charles Wedel, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the Northern Division of the United States District Court of the Northern District of California, Second Division.

Received April 22, 1924.

F. D. MONCKTON,
Clerk.

Filed May 1, 1924.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 4247

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHARLES WEDEL,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR

Upon Writ of Error to the Northern Division of the United States District Court of the Northern District of California, Second Division.

MORRIS OPPENHEIM,
BENJAMIN I. BLOCH,
Attorneys for Plaintiff in Error.

No. 4247

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHARLES WEDEL,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR

Upon Writ of Error to the Northern Division of the United States District Court of the Northern District of California, Second Division.

Statement of Facts.

On January 27, 1923, a bill in equity was filed in the office of the clerk of the United States District Court, for the Northern District of California, Northern Division, in the name of and in behalf of the United States by J. T. Williams, Esquire, United States Attorney, and Garton D. Keyston, Esquire, Assistant United States Attorney for the Northern District of California, seeking to abate and enjoin a certain common nuisance, to wit: The violation of section 21 of title II of the act of Congress of October 28, 1919, known as the "National

Prohibition Act", which was alleged in said bill of equity to exist in a certain hotel known and designated as the "Speedway Hotel", in the Town of Cotati, County of Sonoma, State of California. The property is more particularly and fully described on page 2 of the transcript of record in this case.

The said bill in equity alleges that the plaintiff in error, Charles Wedel, was and is the owner of said property and was the owner of the business conducted on said premises; that on January 31, 1923, the Honorable William C. Van Fleet, Judge of the United States District Court for the Northern District of California, made an order that a temporary writ of injunction should be issued restraining and enjoining the plaintiff in error, his agents, servants, representatives, managers, and employees, and all others, as prayed for in said complaint; that in pursuance of such order a temporary writ of injunction was issued on said 31st day of January, 1923. (Transcript of record, page 4.)

That thereafter plaintiff in error, Charles Wedel, filed with the clerk of said court his duly verified answer to said bill in equity; that by said answer certain issues of fact were raised and the action in equity at the time the proceedings were had which are now before this court for review, was and still is at issue and ready for trial; that said action has never been tried, and the issues raised by said bill in equity and the answer filed thereto have never been tried nor determined.

That on February 28, 1924, an affidavit was filed in the office of the clerk of the United States District Court, Northern District of California, subscribed and sworn to by one C. W. Ahlin, who was then and there employed by the Government of the United States in the capacity of Federal Prohibition Agent, alleging that on the 20th day of January, 1924, the affiant purchased four drinks of whiskey, then and there containing more than one-half of one per cent of alcohol from the plaintiff in error, Charles Wedel, and that he paid the said Charles Wedel the sum of two dollars therefor.

That on February 28, 1924, a writ of attachment was issued by the said District Court directed to the Marshal of said District, commanding him to arrest the said Charles Wedel for an alleged contempt in violating the said temporary writ of injunction.

That thereafter, on March 6, 1924, plaintiff in error was arrested by virtue of the said writ of attachment and on March 18, 1924, the hearing of the matter of the alleged contempt of the said Charles Wedel was had before the Honorable John S. Partridge, District Judge at Sacramento, in the said Northern District of California, Second Division, and at said hearing the Government introduced the affidavit of the said C. W. Ahlin (Transcript of record, page 7) and no other evidence.

Plaintiff in error was found guilty by the court and was ordered to be imprisoned for a period of

six months in the County Jail of Sonoma County, State of California, and to pay a fine in the sum of five hundred ($500.00) dollars, or in default of the payment of said fine, that he be further imprisoned for a period of five (5) months in said County Jail.

From said order of imprisonment and fine plaintiff in error prosecutes this writ of error to the Circuit Court of Appeals, in and for the Ninth Circuit.

The Law of the Case.

It is the contention of plaintiff in error that the District Court was without jurisdiction to issue the said temporary injunction because section 21 of title II of the National Prohibition Act is unconstitutional and void. If such be the case it naturally would follow that no contempt could be committed in the violation of such temporary injunction, and that the proceedings under which the plaintiff in error was ordered to be imprisoned and fined were therefore without jurisdiction and void.

In support of this contention we cite the recent decision of the District Court of the United States for the District of Nebraska, Omaha Division, in the case entitled *United States v. Lot 29, Block 16, Nebraska et al.*, 296 Fed. Rep. 729.

In that case a search warrant was issued by the United States Commissioner, and prohibition agents entered the home of the defendant and arrested the defendant and his wife, and information was duly filed against both husband and wife, but there not

being sufficient evidence against the wife, she was accordingly dismissed. The husband pleaded guilty and was sentenced. In the prosecution of the search warrant a considerable quantity of liquor was found and confiscated, and therefore an action in equity was brought to abate the alleged nuisance and an injunction was prayed for. Defendant filed a motion to dismiss for want of equity jurisdiction, which was granted on the grounds that the provisions of the National Prohibition Act authorizing the issuance of such injunctions were unconstitutional and void.

The court decided that said provisions of the National Prohibition Act were unconstitutional because they merely provided a means to suppress crime as such, and to punish criminals as such by proceedings contrary to the constitutional requirement that all crimes shall be tried by jury.

We quote from the opinion of the learned judge in that case:

> "It might be possible to construe section 22 to mean that injunctions are to issue only where there is proof of reasonable grounds to apprehend future maintenance of a nuisance independently of the past offenses, and so to decide this case on such consideration of the Statute. But I am persuaded that such is not the right interpretation, and that Congress intended to confer equity power to abate and enjoin liquor nuisances and to 'pad-lock' dwelling houses without regard to the situation at the time of the hearing of the injunction suit.
>
> There is reason to believe that the simple declaration 'all crimes shall be tried by jury'

was incorporated in the Constitution of the United States with a very determined purpose to absolutely prevent any court of criminal jurisdiction like that of the Star Chamber Court ever coming into existence in this country.

But if equity courts, as such, may function for the suppression of crime, as provided in this statute; if such courts may without a jury inquire into alleged crimes against the liquor law and may issue their injunctions because they find that in the past such crimes have been committed, and may thereafter punish for contempt, it would seem that all of the important powers of the Court of Star Chamber are assumed in this indirect way.

In the case at bar, the court is asked to inquire, without a jury, whether the defendant, sometime previous to the institution of the suit, made and sold liquor. If the chancellor is satisfied that he did, this law says that the chancellor may evict the defendant from his home and close up his home for a year, thereby imposing upon him an indeterminate but absolute penalty. The court may not know the exact extent to which a residence property will be damaged and deteriorated in this city if left vacant and unoccupied for a year, but it may take judicial notice that such damage might be greater than a sum equivalent to the reasonable value of its use. In addition to this indeterminate penalty, the court is asked to enjoin the defendant perpetually from committing further crimes against the liquor law. There is no scintilla of evidence that he would commit such crimes without the injunction, except the inference that he probably will offend again because he offended in the past. After the injunction laid upon him for the rest of his natural life, or as long as he occupies his home, any accusation against him of liquor vio-

> lation must be tried without a jury, and by the chancellor in a contempt case."

We feel that the reasons set forth by the court in the case above cited are unanswerable, and that the provisions of the National Prohibition Act authorizing the Federal Judge to issue a temporary or a permanent injunction restraining a defendant who has already been convicted of selling liquor upon the premises occupied by him, and punished therefor, are in violation of the constitutional provision that all crimes must be tried by a jury.

In the case at bar the plaintiff in error was convicted of the violation of the National Prohibition Act upon the premises in question; a temporary injunction was issued restraining further violation by plaintiff in error upon said premises; the Government goes no further in the matter and never tries the action in equity wherein they contend that the maintenance of these premises constitutes a public nuisance. More than one year after the issuance of the temporary injunction a prohibition agent makes an affidavit that he purchased four drinks of whiskey upon said premises from plaintiff in error. This fact, if true, constituted a new violation of the National Prohibition Act. It was an offense for which plaintiff in error could be tried and convicted and sentenced under said National Prohibition Act. Plaintiff in error was entitled to a trial by jury under the provisions of the Constitution of the United States. Instead of arresting him for a violation of the National Prohibition Act

the Government seeks to punish him for the same alleged acts upon affidavit only, without extending to him the privilege of being confronted by the witnesses against him, without an opportunity to cross-examine such witnesses, and without allowing him his constitutional right of having a jury pass upon the fact as to whether or not he was or was not guilty of such acts.

We must conclude that the facts of the case at bar constitute stronger reasons for declaring these provisions of the National Prohibition Act unconstitutional than the case decided by the District Court for the District of Nebraska.

It is now universally held, except where there is express statutory provision therefor, that equity has no jurisdiction over a criminal offense, and acts or omissions will not be enjoined merely on the ground that they constitute a violation of law and are punishable as crimes. In ordinary circumstances a complete and adequate remedy for the violation of criminal statutes is afforded by the courts of law, and if a criminal prosecution will constitute an effectual protection against the acts or omissions complained of, no grounds exist for relief by injunction. It is not the intention of the law that constitutional provisions shall be evaded by substituting a civil for a criminal procedure or a single judge for a jury. 32 *Corpus Juris*, page 275 and cases cited.

The above appears to be the general rule relative to the granting of injunctions to restrain the com-

mission of acts which constitute crimes. There appears however, to be an exception to this general rule that where the intervention of equity by injunction is warranted by the necessity of protection to civil rights or property interests, the mere fact that a crime or statutory offense must be enjoined as incidental thereto will not operate to deprive the court of its jurisdiction.

This appears especially to be true in the case of public nuisances, and undoubtedly the Government will contend in the case at bar that the statute having declared expressly that the maintenance of a place where liquor is sold constitutes a public nuisance that the courts of equity can by injunction restrain the maintenance of such a place and can therefore punish by contempt those who violate such injunction.

In the case of *In re Debs*, 158 U. S. 564, the court decided that the issuance of an injunction restraining the defendants in such proceedings from interfering with the United States mails and the punishment for contempt for the disobedience of such injunction did not deprive the petitioner in that case of his constitutional right of trial by jury because the United States Government had a property interest in the mails, which was being jeopardized by threatened acts of violence; and therefore, there being no plain, speedy or adequate remedy at law a court of equity could grant such injunction.

In so far as we have been able to find from the authorities, a court of equity has granted an in-

junction in those cases only where the right of property exists, where it is necessary to protect civil rights or property interests and where the criminal courts are unable to give adequate relief. Such is not the case at bar. The granting of the injunction in this case is not necessary to protect any civil or property rights, and the same acts which would constitute a violation of such an injunction are expressly punishable as crimes under the National Prohibition Act. We therefore earnestly contend that the granting of an injunction, and the punishment for contempt for its violation would constitute a deprivation of the right of trial by jury, and that a statute which would give to the courts of equity the right to grant injunctions against the commission of acts which are solely criminal, would be unconstitutional and void.

We do not contend that the act is invalid in so far as it provides for the abatement of nuisances that are existing or shown by competent evidence to be threatened, but that portion of the act is unconstitutional which attempts to confer the power upon equity courts to punish for contempt any act in violation of the constitutional requirement that the trial of all crimes shall be by jury.

If these provisions of the law are constitutional, the defendant, in a case like the one at bar may be indicted and convicted for the violation of the National Prohibition Act, and the District Attorney

may institute proceedings in equity to abate the alleged nuisance and obtain a temporary injunction against the selling of liquor upon defendant's premises. Thereafter, at any time liquor is sold upon the said premises, the District Attorney may elect between proceedings in the regular way by information or indictment for the new crime committed upon the said premises, which gives the defendant a right to a jury trial and all privileges called for in the criminal law, or he may have the defendant brought before a single judge, without a jury, by summary proceedings, and subject to the same punishment without being confronted by witnesses, without the right of cross-examination, without the presumption of innocence, or the right to be tried by a jury; in fact to deprive him of all rights and privileges granted to him under our criminal procedure. We do not believe that the courts can possibly sustain a procedure which would confer upon a single person, namely the United States District Attorney, such a power. If this power exists there seems to be nothing to prevent a District Attorney from proceeding both ways, that is, by criminal indictment and punishment and also by punishment for contempt in the commission of precisely the same acts.

We respectfully submit that in view of the reasons here stated that the provisions of the National Prohibition Act herein complained of are unconstitutional and void, and that all proceedings had

thereunder are therefore void, and that the petitioner is entitled to be discharged.

Dated, San Francisco,
October 11, 1924.

MORRIS OPPENHEIM,
BENJAMIN I. BLOCH,
Attorneys for Plaintiff in Error.

No. 4247

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHARLES WEDEL,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

STERLING CARR,
United States Attorney,

T. J. SHERIDAN,
Asst. United States Attorney,
Attorneys for Defendant in Error.

Neal, Stratford & Kerr, S. F. 44033

No. 4247

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHARLES WEDEL,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

STATEMENT.

Charles Wedel prosecutes a writ of error to the United States District Court for the Northern District of California to reverse the order of that court adjudging him guilty of contempt of a previous order of the court and ordering that he be imprisoned in the County Jail of Sonoma County for six months, pay a fine of $500 or in default of the payment of said fine that he be further imprisoned for a period of five months in the same jail. The contempt charged in the information filed was that the defendant on the 20th day of January, 1924, violated the provisions of a temporary injunc-

tion theretofore issued by the court in a suit in equity brought under the provisions of Sections 21 and 22 of Title II of the National Prohibition Act to abate a nuisance on certain premises particularly described.

In the record presented here there is included the information filed against defendant seeking an order that he be adjudged guilty of contempt, together with Exhibit "A", being the affidavit of one C. W. Ahlin, setting forth the commission of acts constituting the contempt. There is also included the original order for temporary injunction made in the abatement suit (Trans. Rec. p. 10) and the writ of injunction issued thereunder, together with a return of service thereof. (Trans. Rec. pp. 11, 12 and 13.) Following the filing of the information the court ordered an attachment which was thereupon issued. The attachment and the Marshal's return of service thereof appear in the Transcript of Record at pages 14, 15 and 16. The defendant appeared, there was a hearing, whereupon the court found the defendant guilty and punished him as aforesaid. (Trans. Rec. p. 17.)

The original bill of complaint in the abatement suit is not supplied, nor any affidavits that may have been filed in support of the application for a temporary injunction. It is stated, however, in the brief for plaintiff in error that the bill in equity was filed on January 27, 1923, seeking in the name of the United States to abate and enjoin a common

nuisance, to wit, the violation of Section 21 of Title II of the National Prohibition Act, which was alleged to *exist* in a hotel designated as the "Speedway Hotel" at Cotati, Sonoma County, California. The brief further sets forth that it was alleged that defendant was the owner of the said property and the business, and that on January 31, 1923, the Judge of the said court ordered that a temporary writ of injunction should issue restraining the defendant from certain acts. It further appears that defendant answered and that the abatement suit was pending at the time of the proceeding had of which complaint is made.

It thus appears that an action against the defendant to abate a nuisance at the "Speedway Hotel", Cotati, Sonoma County, California, was filed January 27, 1923; that the Judge of the said court on January 31, 1923, issued an order for a temporary writ of injunction which was served on the defendant on the 10th day of February, 1923; that thereafter, to wit, on January 20, 1924, while the action was still pending, one C. W. Ahlin, a Prohibition Agent, entered the hotel in question and asked for and received from the waiter in possession and charge four drinks of whiskey and paid $2.00 therefor, and that the waiter serving the drinks was known to be the defendant Charles Wedel. Thereupon an information was filed on February 26, 1924, supported by affidavit of Ahlin, charging the defendant with a commission of a contempt in violation of the provisions of said injunction. The

defendant having been brought in, on March 18, 1924, there was a hearing had, the affidavit aforesaid was introduced in evidence; the defendant offered no evidence, whereupon he was convicted and punished as above stated.

POINT INVOLVED.

The brief of counsel for plaintiff in error is confined to the single question raised by them, to wit, that Section 21 of Title II of the National Prohibition Act was unconstitutional and void.

ARGUMENT.

(1) THE METHOD OF REVIEWING THE ORDER COMPLAINED OF IS PROPERLY BY APPEAL AND NOT BY WRIT OF ERROR.

It is proper to state *in limine* that the order complained of in the instant case should be reviewed by appeal and not by writ of error. The main case was a suit in equity. The particular order was made in the same proceeding, or in any event, in a special proceeding in which a jury was not allowed or allowable. In such case the review is by appeal as has recently been held by the Supreme Court of the United States in the case of

Essgee Co. vs. U. S., 262 U. S. 151, 153.

In view of the provisions of the Act of September 6, 1916, entitled "An Act to Amend the Judicial Code" (39 Stat. 726, c. 448, Sec. 4) the particular

mode of review adopted may be unimportant since the court can take appropriate action. However, the question of a proper record still remains when application is made of the action quoted. But in the instant case, since the argument of counsel is confined wholly to the constitutional question, it is believed that sufficient appears in the transcript for the court to determine the point.

(2) SECTION 21 OF TITLE II OF THE NATIONAL PROHIBITION ACT IS ENTIRELY CONSTITUTIONAL AND VALID; THE MATTER IS NO LONGER AN OPEN QUESTION.

It appears that the United States was proceeding below by suit in equity to abate a liquor nuisance brought under the provisions of Section 21 of Title II of the National Prohibition Act. Such proceeding is usually based upon the allegation that a common nuisance *exists,* that is to say, exists at the time of the filing of the bill of complaint. Since the complaint is not supplied, the matter will be presumed in favor of the government. In fact, in plaintiff's brief, top of page 2, it is stated that such an allegation was made.

That legislation of the character involved is entirely valid has been expressly decided by the Supreme Court of the United States in one of the cases reported as

Mugler vs. Kansas, 123 U. S. 623, 31 L. Ed. 205.

The precise point was considered in one of the cases there reported,

Kansas vs. Ziebold and Hagelin,

reference being made to the point at page 213 L. ed. 2d. It is there pointed out that legislation of that character had been enacted by the State of Kansas in 1885, and it was held generally that it is within the competency of the legislature to declare the particular act a common nuisance, although it might not theretofore have been so considered, and that having so determined, jurisdiction could be assigned to a court of equity to abate the nuisance, and, in the event of a violation of the decree or order of the court in the premises, a contempt proceeding could be instituted in which a jury would not be allowed.

The application of the holding of Mugler vs. Kansas to Section 21 of the National Prohibition Act has been made in several cases, and the section in question upheld as against an attack for unconstitutionality. One of the cases so ruling is that of

Lewishon vs. U. S., 278 Fed. 421, 427.

The same ruling upon the same point was made by the Circuit Court of Appeals of the Second Circuit in the case of

U. S. vs. Reisenwever, 288 Fed. 520, 523,

in which a large number of cases bearing on the point are reviewed.

Indeed, in the brief of plaintiff in error, page 10, it is said that they do not contend that the act is invalid insofar as it provides for the abatement of *nuisance existing or threatened,* but it seems to be urged that that portion of the act is invalid "which attempts to confer the power upon equity courts to punish for contempt any act in violation of the constitutional requirement that the trial of all crimes shall be by jury."

It is sufficient to say in response to the latter contention that the precise point was decided against them in the case of

Lewishon vs. U. S., supra, at page 428,

in which it is shown by the court that the question is foreclosed by the at least two decisions of the Supreme Court of the United States which are cited—

Eilenbecker vs. Plymouth County, 134 U. S. 131, 33 L. Ed. 801, and

In re Chapman, 166 U. S. 661, 41 L. Ed. 1054.

The principal support of counsel's contention is said to be the decision of the District Court for Nebraska in the case of

U. S. vs. Lot 29, Block 16, Nebraska, et al., 296 Fed. 729.

But if the opinion in that case is to be deemed to be to the effect that the legislation is unconstitutional, it is in conflict with the decisions above cited. It is equally in conflict to the decision cited if it is meant to hold that the legislation, while constitu-

tional in part, is invalid as far as it deprives a respondent in a contempt case of the right of trial by jury.

But a close analysis of the decision shows that it really turned upon questions of fact; for it was reasoned that by the concession of the government the nuisance there under review had been in fact *abated before* the institution of the suit in equity. And from the circumstances apparent in the case, the court was not convinced that any future nuisance was *threatened*. In such a state of the case the same ruling would be made by any other court, but the constitutionality of the act would not be involved.

Reference may be made upon questions of procedure involved in the instant case to the case of

Allen vs. U. S., 278 Fed. 429,

wherein the Circuit Court of Appeals for the Seventh Circuit points out that where the court has jurisdiction of the subject matter, as here, the measure of the required observance of the temporary injunction order is not the bill filed but the order itself, and defendant must yield in obedience thereto whether or not a cause of action is technically or sufficiently stated by the bill. Here the order for the injunction and the injunction was very definite in restraining the acts which were afterwards committed by the defendant.

In conclusion, we submit that the question of constitutionality argued in the case at bar has been

entirely foreclosed by the decisions of the Supreme Court of the United States hereinabove cited. The order adjudging the defendant guilty of contempt for his flagrant violation of the temporary injunction should be affirmed.

STERLING CARR,
United States Attorney,

T. J. SHERIDAN,
Assistant United States Attorney,
Attorneys for Plaintiff in Error.

No. 4248

United States
Circuit Court of Appeals
For the Ninth Circuit.

WILLIAM S. WEST,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

FRANK R. JEFFREY, Federal Building, Spokane, Washington,

H. SYLVESTER GARVIN, Federal Building, Spokane, Washington,

Attorneys for Plaintiff and Defendant in Error.

EDWARD A. DAVIS, Pasco, Washington,

Attorney for Defendant and Plaintiff in Error. [1*]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. ——.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WM. S. WEST and JERRY McKAY, *alias* JAMES D. STOTT,

Defendants.

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*Page-number appearing at foot of page of original Certified Transcript of Record.

INFORMATION.

H. Sylvester Garvin, Assistant United States Attorney for the Eastern District of Washington, who for the said United States and in this behalf prosecutes in his own proper person, comes into court on this 19th day of September, in the year 1923, and with leave of the Court first had and obtained, upon his official oath gives the Court here to understand and to be informed as follows:

COUNT I.

That Wm. S. West and Jerry McKay, *alias* James D. Stott, whose other or true names are unknown, late of the County of Spokane, State of Washington, heretofore, to wit, on or about the 20th day of May, 1923, in the said county of Spokane, in the Northern Division of the Eastern District of Washington and within the jurisdiction of this Court, did then and there knowingly, wilfully and unlawfully sell a quantity of intoxicating liquor, to wit, Scotch whiskey and Canadian beer, the exact amount of which is unknown to one J. Pickett and one J. M. Simmons, then and there containing more than one-half of one per centum of alcohol by volume and then and there being fit for beverage purposes, and which said sale by the said Wm. S. West and Jerry McKay, *alias* James D. Stott, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, [2] 1919, known as the National Prohibition Act, contrary to the form of the statute in such

case made and provided and against the peace and dignity of the United States.

COUNT II.

And the Assistant United States Attorney for the Eastern District of Washington, further informs the Court:

That Wm. S. West and Jerry McKay, *alias* James D. Stott, whose other or true names are unknown, late of the county of Spokane, State of Washington, heretofore, to wit, on or about the 2d day of June, 1923, in the said county of Spokane, in the Northern Division of the Eastern District of Washington and within the jurisdiction of this Court, did then and there knowingly, wilfully and unlawfully sell to one J. M. Simmons intoxicating liquor, to wit, Scotch Whiskey and Canadian Beer, the exact amount being to the Assistant United States Attorney unknown, then and there containing more than one-half of one per centum of alcohol by volume and then and there being fit for beverage purposes, and which said sale by the said Wm. S. West and Jerry McKay, *alias* James D. Stott, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT III.

And the Assistant United States Attorney for the Eastern District of Washington, further informs the Court:

That Wm. S. West and Jerry McKay, *alias* James D. Stott, whose other or true names are unknown, late of the county of Spokane, State of Washington, heretofore, to wit, on or about the 8th day of June, 1923, in the said county of Spokane, in the Northern Division of the Eastern District [3] of Washington and within the jurisdiction of this Court, did then and there knowingly, wilfully and unlawfully sell to J. Pickett and J. M. Simmons intoxicating liquor, to wit, Scotch whiskey and Canadian beer, the exact amount being to the Assistant United States Attorney unknown, then and there containing more than one-half of one per centum of alcohol by volume and then and there being fit for beverage purposes, and which said sale by the said Wm. S. West, and Jerry McKay, *alias* James D. Stott, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT IV.

And the Assistant United States Attorney for the Eastern District of Washington, further informs the Court:

That Wm. S. West and Jerry McKay, *alias* James D. Stott, whose other or true names are unknown, late of the county of Spokane, State of Washington, heretofore, to wit, on or about the 8th day of June, 1923, in the said county of Spokane, in the Northern Division of the Eastern District

of Washington and within the jurisdiction of this Court, did then and there knowingly, wilfully and unlawfully sell to one J. Pickett two (2) quarts of spirituous liquor called Canadian beer, then and there containing more than one-half of one per centum of alcohol by volume and then and there being fit for beverage purposes, and which said sale by the said Wm. S. West and Jerry McKay, *alias* James D. Stott, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the [4] National Prohibition Act, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT V.

And the Assistant United States Attorney for the Eastern District of Washington, further informs the Court:

That Wm. S. West and Jerry McKay, *alias* James D. Stott, whose other or true names are unknown, late of the county of Spokane, State of Washington, heretofore, to wit, on or about the 20th day of May, 1923, in the said county of Spokane, in the Northern Division of the Eastern District of Washington and within the jurisdiction of this Court, did then and there knowingly, wilfully and unlawfully have and maintain a common nuisance at and on the premises known as the Cliff House, west of the city of Spokane, in Spokane county, near the Sunset Boulevard, in that the said Wm. S. West and Jerry McKay, *alias* James D. Stott, did then and there sell

and keep intoxicating liquor then and there containing more than one-half of one per centum of alcohol by volume and then and there being fit for beverage purposes and which said sales and keeping of intoxicating liquor by the said Wm. S. West and Jerry McKay, *alias* James D. Stott, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

H. SYLVESTER GARVIN,
Assistant United States Attorney. [5]

United States of America,
Eastern District of Washington,—ss.

H. Sylvester Garvin, being first duly sworn, upon his oath deposes and says:

That he is the duly appointed, qualified and acting Assistant United States Attorney for the Eastern District of Washington and that he makes this verification as such; that he has read the above and foregoing information, knows the contents thereof and that the same is true as he verily believes.

H. SYLVESTER GARVIN.

Subscribed and sworn to before me this 19th day of September, A. D. 1923.

A. P. RUMBURG,
Deputy Clerk, United States District Court, Eastern District of Washington.

Let process issue.

Dated this 19th day of September, A. D. 1923.

J. STANLEY WEBSTER,
Judge.

Bond fixed at $——.

Filed in the U. S. Dist. Court, Eastern Dist. of Washington. Sep. 19, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [6]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. C–4308.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WILLIAM WEST,
Defendant.

VERDICT.

We, the jury in the above-entitled cause, find the defendant is guilty as to first count, is guilty as to second count, is guilty as to third count, is guilty as to fourth count, is guilty as to fifth count, as charged in the information.

WM. A. KOMMERS,
Foreman.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 17, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [7]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. C–4308.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM WEST,

Defendant.

MOTION FOR NEW TRIAL.

Comes now the defendant and moves the Court for an order setting aside the verdict rendered by the jury herein, and granting the defendant a new trial in said cause, for the following reasons, to wit:

1. The verdict of the jury is not sustained by the evidence.

2. The verdict of the jury is contrary to the evidence and the law.

3. Errors in law, occurring at the time of the trial, and excepted to at the time by the defendant.

EDWARD A. DAVIS,
Attorney for Defendant.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 18, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [8]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

September, 1923, Term—Saturday, Oct. 20, 1923—39th day.

Present: Honorable J. STANLEY WEBSTER, Presiding.

PROCEEDINGS:

No. C–4308.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM WEST,

Defendant.

MINUTES OF COURT—OCTOBER 20, 1923—ORDER DENYING MOTION FOR NEW TRIAL.

Now on this day the above-entitled cause came on regularly for hearing on motion for new trial, and said motion having been argued by counsel, and the Court being fully advised in the premises, it is hereby

ORDERED that said motion be, and the same hereby is denied, to which defendant excepts, and exception allowed.

IT IS FURTHER ORDERED that said defendant is hereby allowed sixty days from this date in which to file bill of exceptions in this cause.

* * * * * * * * *

J. STANLEY WEBSTER,
Judge. [9]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. C–4308.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WILLIAM WEST,
Defendant.

SENTENCE.

Now, on this 20th day of Oct. 1923, into Court comes the above-named defendant for sentence, and being informed by the Court of his conviction herein of record, he is asked by the Court if he has any legal cause to show why the judgment of this Court should not now be pronounced in his case, he nothing says, save as he before hath said.

WHEREUPON, it is now by the Court CONSIDERED and ADJUDGED upon the verdict of the jury finding defendant guilty as charged in the information, that said defendant is guilty, and that said defendant, now before the Court, be confined in the Spokane County Jail, State of

Washington, or in such other prison as may be hereafter designated for the confinement of persons convicted of offenses against the laws of the United States, for a period of four months and to pay a fine of $400, to stand committed until he is duly discharged by law, and now the said defendant is committed to the custody of the marshal of the United States for the Eastern District of Washington, who will carry this sentence into execution.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 20, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [10]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. C–4308.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM WEST,

Defendant.

BAIL BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That the undersigned defendant herein herewith deposits with the clerk of the above-entitled court the sum of Fifteen Hundred Dollars ($1500.00) as a bond for my appearance in said court or in the United States Circuit Court of Appeals for

the 9th Judicial Circuit at the time or times herein specified.

Signed and sealed this 22d day of October, A. D. 1923.

The condition of the above obligation is such that,

WHEREAS the above-bonded principal WILLIAM WEST has prosecuted a writ of error to the Circuit Court of Appeals for the 9th Judicial Circuit to reverse the judgment and to grant to the principal a new trial in the above-entitled action, and

WHEREAS, the *bale* and supersedeas bond of the defendant has been fixed at Fifteen Hundred Dollars ($1500.00), and

WHEREAS, the above principal has furnished *bale* in the sum of Fifteen Hundred Dollars ($1500.-00), which sum is now on deposit with the clerk of the said court.

NOW, THEREFORE, if the said William West shall prosecute the writ of error in said court and surrender himself unto the said court if he shall fail to make good his plea and shall abide by the order or decree of the said court or of the said Circuit Court of Appeals, then and in that event these *presences* to be void, otherwise to be and remain in full force and virtue of law. [11]

WILLIAM WEST,
Principal.

EDWARD A. DAVIS,
Witness to Signature.

Approved this Oct. 26th, 1923.

J. STANLEY WEBSTER,
Judge.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 26, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [12]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. C–4308.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM WEST,

Defendant.

APPLICATION FOR EXTENSION OF TIME.

Comes now the defendant William West and moves the Court for an order extending until January 20, 1924, the time for perfecting his appeal herein and for suing out his writ of error and filing his bill of exceptions and for taking the other steps necessary toward the perfecting of said appeal for the reason that said defendant and his attorney are not able to complete the said record during the time allowed by the order of Court herein made.

This motion is based on the affidavit hereto attached.

EDWARD A. DAVIS,
Attorney for Defendant.

State of Washington,
County of Franklin,—ss.

I, Edward A. Davis, on oath state that I am the attorney for the defendant in the above-entitled cause and make this affidavit in support of the foregoing motion; that I have ordered the statement of fact or transcript of the evidence to be made by the court reporter who took the testimony at the hearing of said cause but am not able to secure said transcript or statement in time to perfect the appeal in this cause within the period fixed by the Court in the order made at the time notice of said appeal was given; that the said court reporter who took the testimony at the hearing of *was* cause was one A. W. Deavitt and that I have ordered the said [13] transcript to be made by him; that I am to-day in receipt of a letter from W. B. Cornell, another of the official court reporters in the county of Spokane, State of Washington, which letter is as follows, to wit:

Spokane, Wash., December 11, 1923.

Mr. Edward A. Davis,
Pasco, Washington.

Dear Mr. Davis:

Mr. A. W. Deavitt, court reporter who reported a case for you in Federal Court recently, has asked me to inform you that he has been ill at home for several days, and that it will be three or four days before he will be able to start work on the Statement of Facts which you asked him to get out. He

thought you might want to secure an extension of time under the circumstances.

Yours very truly,
(Signed) W. B. CORNELL,
Official Court Reporter.

That by reason of the facts above set out it is necessary that I have an extension of time in order to properly perfect and present the defendant's appearance in said action; that no injury or inconvenience will result to the Government or to anyone else *of* account of this delay for the reason that the said cause cannot be brought on for hearing until the April term of 1924, and ample time will remain for bringing said cause on at said term if the extension of time herein asked for shall be granted.

EDWARD A. DAVIS.

Subscribed in my presence and sworn to before me this 12th day of December, A. D. 1923.

[Seal] NELLIE NICHOLS,
Notary Public in and for the State of Washington
Residing at Pasco.

Filed in the U. S. Dist. Court, Eastern District of Washington. Dec. 20, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [14]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. C–4308.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM WEST,

Defendant.

ORDER EXTENDING TIME TO AND INCLUDING JANUARY 20, 1924, TO PERFECT APPEAL.

Now, on this 19th day of December, A. D. 1923, the above-entitled cause coming on to be heard upon the motion of the defendant for an extension of time within which to sue out his writ of error, file his bill of exceptions and do all other things necessary to perfect his appeal in the above-entitled cause; and the Government being represented by F. R. Jeffrey, United States District Attorney, and the Court having inspected said application and being in all things duly advised,—

IT IS HEREBY ORDERED that the said application be and the same is hereby granted and the defendant is given an extension of time until January 20, 1924, within which to take the necessary steps for perfecting the appeal in said cause.

Done by the Court this 19th day of December, A. D. 1923.

J. STANLEY WEBSTER,
Judge of Said Court.

O. K.—FRANK R. JEFFREY,
U. S. Attorney.

Filed in the U. S. District Court, Eastern District of Washington. Dec. 20, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [15]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WILLIAM WEST,
Defendant.

ORDER EXTENDING TIME TO AND INCLUDING FEBRUARY 15, 1924, TO PERFECT APPEAL.

Now on this 19th day of January, A. D. 1924, pursuant to the stipulation of the parties hereto, it is hereby ordered that the time within which the defendant may perfect his appeal, sue out his writ of error, file his bill of exceptions and take such other steps as are necessary toward the perfecting of

such appeal may be, and the same is hereby extended until the 15th day of February, A. D. 1924.

J. STANLEY WEBSTER.
Judge of Said Court.

O. K.—FRANK R. JEFFREY,
U. S. Attorney.

Filed in the U. S. District Court, Eastern District of Washington. Jan. 21, 1924. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [16]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. C–4308.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WILLIAM WEST,
Defendant.

PETITION FOR WRIT OF ERROR.

Comes now William West, defendant herein, and says, that on or about the 20th day of October, 1923, this Court entered judgment and sentence against the defendant William West, in which judgment and proceedings thereunto had in this cause certain errors were committed to the prejudice of the defendant, all of which will appear more in detail from the assignment of errors which is filed with this petition.

WHEREFORE, the said William West prays that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals in and for the Ninth Circuit of the United States, for the correction of the errors so complained of, and that the Court fix the bond to operate also as a supersedeas, and that a transcript of the record, proceedings, and papers in said cause, duly authenticated may be sent to the said Circuit Court of Appeals.

EDWARD A. DAVIS,
Attorney for Defendant.

Filed in the U. S. District Court, Eastern District of Washington. Feb. 15, 1924. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [17]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. C–4308.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WILLIAM WEST,
Defendant.

ASSIGNMENT OF ERRORS.

Comes now the defendant and herein files his assignment of errors committed by the trial judge in the proceeding and trial of the above-entitled cause as follows, to wit:

1.

The Court erred in denying the motion of the defendant for a direct verdict of not guilty.

2.

That the Court erred in denying the motion of the defendant for a new trial upon the grounds and reasons stated in said motion to which reference is hereby made.

3.

That the Court erred in its rulings upon objection to evidence at the time of said trial as set out in the bill of exceptions herein filed and to which reference is hereby made.

EDWARD A. DAVIS,
Attorney for Defendant.

Filed in the U. S. District Court, Eastern District of Washington. Feb. 15, 1924. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [18]

In the District Court of the United States, in and for the Eastern District of Washington, Northern Division.

No. C–4308.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WILLIAM S. WEST,
Defendant.

ORDER ALLOWING WRIT OF ERROR.

On this 16th day of April, 1924, came the defendant William S. West, and filed herein and presented to the Court his petition praying for the allowance of a writ of error, and filed therewith his assignments of error, intended to be urged by him, and prayed that the bond be given to operate also as a supersedeas and stay bond, be fixed by the Court, and also that a transcript of the record and proceedings and papers upon which judgment and sentence herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and such other and further proceedings may be had as may be proper in the premises.

In consideration thereof the Court does allow the writ of error and the cash bail heretofore deposited with the clerk in this cause is hereby ordered and adjudged to operate also as a supersedeas, the same being cash in the sum of $1500.00, and the defendant having given for deposit for such bond, all proceedings to enforce said sentence and judgment to be stayed, until such writ of error is determined.

J. STANLEY WEBSTER,
Judge.

Filed in the U. S. District Court, Eastern District of Washington. Apr. 15, 1924. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [19]

In the District Court of the United States, in and for the Eastern District of Washington, Northern Division.

No. C–4308.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM S. WEST,

Defendant.

WRIT OF ERROR.

The President of the United States to the Honorable Judge of the District Court of the United States, for the Eastern District of Washington, Northern Division, GREETING:

Because in the records and proceedings as also in the rendition of judgment and sentence on a plea, which in the said District Court before you, or some one of you, between William S. West, plaintiff in error (defendant in the lower court), and the United States of America, defendant in error (plaintiff in the lower court), manifest error hath happened, to the great damage of the said William S. West, plaintiff in error as by his complaint appears:

We being willing that error, if any hath happened, shall be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf duly command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid,

with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date of this writ in the said Circuit Court of [20] Appeals, to be then and there held, that the records and proceedings aforesaid, being inspected, this said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 16th day of April, 1924, in the year of our Lord one thousand nine hundred twenty-four.

[Seal] ALAN G. PAINE,
Clerk of the United States District Court, for the Eastern District of Washington, Northern Division.

Allowed by:

J. STANLEY WEBSTER,
District Judge.

Filed in the U. S. District Court, Eastern District of Washington. April 16, 1924. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy.

[Endorsed]: No. C–4308. Writ of Error. Filed in the U. S. District Court, Eastern Dist. of Washington. Apr. 16, 1924. Alan G. Paine, Clerk. A. P. Rumburg, Deputy. [21]

In the District Court of the United States, in and for the Eastern District of Washington, Northern Division.

No. C–4308.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM S. WEST,

Defendant.

CITATION ON WRIT OF ERROR.

The President of the United States to the United States of America, and the Messrs. F. R. JEFFREY and H. SYLVESTER GARVIN, Your Attorneys, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error, regularly issued, and which is on file in the office of the clerk of the District Court of the United States, for the Eastern District of Washington, Northern Division, in an action pending in said court, wherein William S. West is plaintiff in error (defendant in the lower court), and the United States of America, is defendant in error (plaintiff in the lower court), and to show cause, if any there be, why the judgment in said writ of error mentioned, should not be corrected and

speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States of America, this 16th day of April, 1924.

J. STANLEY WEBSTER,
United States District Judge. [22]

Due and legal notice of above citation acknowledged and coy thereof received this 16th day of February, 1924.

H. SYLVESTER GARVIN,
Asst. U. S. District Attorney.

Filed in the U. S. Dist. Court, Eastern District of Washington. Apr. 16, 1924. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy.

Filed in the U. S. District Court, Eastern Dist. of Washington. Apr. 16, 1924. Alan G. Paine, Clerk. A. P. Rumburg, Deputy. [23]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. C–4308.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

WILLIAM WEST,
Defendant.

NOTICE RE BILL OF EXCEPTIONS.

To the Above-named Plaintiff and to Messrs. F. R. Jeffrey and H. Sylvester Garvin, Your Attorneys:

You and each of you are hereby notified that the above-named defendant has prepared and filed with the Clerk of the above-entitled court a proposed bill of exceptions, a copy of which is herewith served upon you.

You are further notified that the defendant will, at the time said bill of exceptions is certified, ask the Court to order attached and made a part of said bill of exceptions all of the exhibits received or offered in evidence on the trial, which are not already a part hereof.

Dated at Spokane, Washington, this 15th day of February, 1924.

EDWARD A. DAVIS,
Attorney for Defendant.

Service of the above and foregoing notice and of the bill of exceptions thereto attached, by true copy thereof, is hereby acknowledged this 15th day of February, 1924.

H. SYLVESTER GARVIN,
Asst. U. S. Attorney,
U. S. District Attorney.

Feby. 15th, 1924.

Filed Feb. 15, 1924. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [24]

In the District Court of the United States, in and for the Eastern District of Washington, Northern Division.

No. C–4308.

Before Hon. J. STANLEY WEBSTER, District Judge.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

WILLIAM WEST,
Defendant.

BILL OF EXCEPTIONS.

Appearances:

For the Plaintiff: Mr. H. SYLVESTER GARVIN, Asst. United States Attorney.

For the Defendant: Mr. EDWARD A. DAVIS.

BE IT REMEMBERED, that the above-entitled cause came on regularly for hearing in the above-entitled court on Wednesday, October 17th, 1923, at 10:00 o'clock A. M., before the Honorable J. Stanley Webster, District Judge; the plaintiff appearing by H. Sylvester Garvin, Assistant United States District Attorney, and the defendant appearing in person and by his attorney, Edward A. Davis, and the following proceedings were had and done, to wit:

A jury was duly empaneled and sworn to try the case and an opening statement was made by Mr. Garvin and thereafter the following statements were introduced on behalf of the plaintiff. [25]

TESTIMONY OF J. M. SIMMONS, FOR THE GOVERNMENT.

J. M. SIMMONS, called as witness by the United States, being sworn, testified in its behalf as follows:

"I am a federal prohibition agent and was in Spokane during the months of May and June, 1923, and met the defendant Mr. West during that time. I met him first on the 19th of May at the place known as the Cliff House. I was accompanied by Agent Pickett and a lady by the name of Maxine Dale and a taxicab driver and a woman named Pauline Marks. I went out to the place again on June 2d. At this time I went out there alone.

I went out again on June 8th in the afternoon with Agent Picketts. We purchased Scotch whisky and beer. At this time I purchased three drinks of Scotch whisky and twelve drinks of Canadian beer. They were served to us by Jerry McKay.

The defendant West was not there at that time."

Mr. DAVIS.—The defendant objects to the testimony of what occurred when he was not there and moves that it be stricken and the jury instructed to disregard it.

The COURT.—I will reserve my ruling until all the testimony is in, and you may renew your motion.

WITNESS.—Aside from the one place in question I visited possibly eight or ten other places. I do not say exactly and it is only by consulting my record that I would be able to tell you how many

(Testimony of J. M. Simmons.)

places we visited here in Spokane for that purpose.

Question.—Now, give me the list of the names of the persons that you met at these eight or ten places—how many places were there?

Answer.—I said between eight and ten.

Q. Between eight and ten. That must have been [26] nine, then; that is the only number between eight and ten, isn't it? Now, give me the names of the persons that you met at those nine places.

A. If there is any of the cases that are still pending, I would rather not answer.

Q. I do not care what you would rather do, I am asking you a question. A. Why, there is—

Mr. GARVIN.—If the Court please, I cannot see the competency of this testimony in reference to all the places he visited during that period of time.

Mr. DAVIS.—It goes to the credibility of the witness.

The COURT.—The objection is sustained.

Mr. DAVIS.—Exception.

Q. You say you bought liquor from McKay in each instance when you were out there?

A. Jerry McKay served it, yes, sir.

Q. And you bought the liquor from him, did you?

A. Yes, sir.

Q. That was true on each occasion when you were out there? A. Yes, sir.

Q. On the night of the 19th and the morning of the 20th of May and on the night of the 2d of June and on the afternoon of the 8th of June?

A. Yes, sir, all cases the same, yes, sir.

(Testimony of J. M. Simmons.)

Q. On all three of those occasions you bought the liquor from McKay? A. Yes, sir.

Q. And bought it all, and he was the only one from whom you bought? A. Yes, sir. [27]

TESTIMONY OF JOHN PICKETT, FOR THE GOVERNMENT.

JOHN PICKETT, called as a witness by the United States, being duly sworn testified as follows:

"My name is John Pickett and I am also a federal prohibition agent and am acquainted with the defendant in this case. I met him first on May 19, 1923, at what is known as the Cliff House about five miles west of Spokane. I was also with Agent Simmons, Maxine Dale, Pauline Marks and a taxi driver. We bought Scotch whisky and Canadian beer both of which contained more than one-half one per cent alcohol in volume. I went out there again on the afternoon of June 8th, 1923, and we purchased some drinks. They contained more than one-half of one per cent alcohol. I tell from tasting liquor the per cent of alcohol contained by the experience I have had in buying and tasting liquor."

Q. From that experience what is there in the taste of liquor which guides you to the amount of alcohol it contains?

A. Well, you can tell by the high percentage of alcohol or the low percentage of alcohol, by the effect it has on you.

Q. By the effect it has on you? A. Yes, sir.

(Testimony of John Pickett.)

Q. What is that effect if it contains more than one-half of one per cent?

A. Well, I don't know how to express it.

Q. You become intoxicated, don't you?

A. Well, if you take on a load of it, yes, sir.

Q. How is that?

A. If you take on an abundance of it, yes.

Q. Suppose you take on seven or eight drinks?

A. No, no, you could not become intoxicated on [28] seven or eight drinks.

Q. Of Scotch whisky? A. No, sir.

Q. You could not? A. No, sir.

Q. All right. How many drinks of Scotch whisky would you have to have to get drunk?

A. Well, I don't know. I never was drunk, so I don't know how many I would have to have.

Q. Never were drunk? A. No, sir.

Q. How do you know then from your personal experience with it that it will make you drunk?

A. I know by the feeling that you have that it contains more than one-half of one per cent alcohol or that it has alcohol in it.

Q. You know by the feeling you have. How do you know that it is intoxicating if you have never been intoxicated?

A. Well, I know that it would—

Q. You know that it would intoxicate you if you kept on drinking it?

A. I feel certain that it would.

Q. You feel certain that it would but you don't

(Testimony of John Pickett.)

know from any personal experience with it, do you, because you have never been drunk?

A. I never been drunk, no.

Q. And you were not drunk when you went out there? A. No, sir.

Q. Had you been drinking before you went out there?

A. I believe that we did have a few drinks, yes, sir.

Q. You believe that you did have a few drinks and went out and got seven more while you were there?

A. Seven more of beer. I did not drink Scotch whisky out there.

Q. Oh, you did not drink Scotch whisky? [29]

A. No, sir.

Q. Did not try any of it at all?

A. No, sir, not out there on May 20th I did not.

Q. Then you don't know what was being served there that they called Scotch whisky, do you?

A. I know what was asked for.

Q. You said awhile ago that it contained more than one-half of one per cent from tasting it?

A. That that I drank.

Q. But you did not drink any?

A. I drank beer.

Q. You drank beer. I am asking you about Scotch whisky that you said was sold there. You did not drink any of that? A. Yes, sir.

Q. You did drink some of it? A. Yes, sir.

(Testimony of John Pickett.)

Q. A moment ago you said you did not. Now, which is correct?

A. On May 20th I did not, and on May 8th I did.

Q. On May 20th is what we are talking about.

A. I could not, because I did not have any Scotch whisky to drink that night.

Q. You did not drink any Scotch whisky on May 19th or 20th did you? A. No, sir.

Q. Then you don't know what that was that they were serving and call Scotch whisky, do you?

Mr. GARVIN.—If the Court please, he has answered that three times, that he did not know.

The COURT.—Of course, he cannot know, Mr. Davis, if he did not taste it, and he said he did not. The conclusion draws itself. He cannot know according to his own testimony.

Mr. DAVIS.—That is undoubtedly true, but he has also said he knows that it was from tasting it. Which of these statements are we to accept?

The COURT.—He said he knows what it was from [30] tasting on one occasion when he did taste it, and he does not know what it was on another occasion when he did not taste it.

Mr. DAVIS.—Q. Then it was on June 8th that you are able to testify as to the alcoholic contents of that liquor which was labeled "Scotch Whisky"? A. Yes, sir.

Q. And you cannot say anything about what was the alcoholic contents of the liquor labeled "Scotch Whisky" which was sold on May 19th and 20th?

A. No, sir.

TESTIMONY OF JAMES D. SCOTT (*alias* JERRY McKAY), FOR THE GOVERNMENT.

JAMES D. SCOTT, *alias* JERRY McKAY, called as a witness by the United States, being sworn, testified on its behalf as follows:

The COURT.—Mr. McKay, you are charged in this court with certain violations of the National Prohibition Act. I deem it my duty to advise you that if any question is asked you while you are upon the witness-stand the answer to which will tend to convict you of any crime, you may refuse to answer the question, if you care to, stating that you refuse to answer for the reason that it may tend to convict you of a crime.

Mr. DAVIS.—The defendant West excepts to the statement of the Court as an incorrect statement of the rule of law, with all due respect to your Honor. I think the correct rule of law is that he cannot be excused from testifying, but that his evidence cannot be used against him.

The COURT.—Well, in any event Mr. Davis, it is his personal privilege. It has nothing to do with your client.

Mr. DAVIS.—No, no, but it does have to do with the testimony is all.

The COURT.—It is for the protection of the witness, [31] not for the defendant, that this privilege exists. Proceed with the examination.

Mr. DAVIS.—I am not referring to the witness. I am making the objection as to ourselves.

(Testimony of James D. Scott.)

The COURT.—Proceed with the examination.

WITNESS.—I was employed during the months of May and June as a waiter at the place known at the Cliff House out from Spokane.

Q. Whom were you employed out there by?

A. By Mr. West.

Mr. DAVIS.—I object as calling for a conclusion.

The COURT.—Overruled.

Mr. GARVIN.—Q. What were your duties out there, Mr. Scott?

Mr. DAVIS.—Objected to as immaterial.

The COURT.—Overruled.

Mr. DAVIS.—He might have done his duties or might not.

Mr. GARVIN.—I asked him what they were.

The COURT.—I will overrule the objection.

A. I was a waiter.

WITNESS.—My services ceased out there about the end of July.

Q. About the last of July. What were your general duties there on those premises?

Mr. DAVIS.—Objected to as immaterial.

The COURT.—Overruled.

Mr. DAVIS.—Exception.

WITNESS.—I remember Mr. Simmons and Mr. Pickett being out there. I cannot recall the dates but I remember what they did out there. They did the same as anyone else. On one occasion they walked out there through the rain in [32] the afternoon.

Mr. DAVIS.—Just a moment; that refers again

(Testimony of W. S. West.)

to this time when the defendant was not there and I object to it.

The COURT.—Overruled.

At the close of the testimony for the Government the following proceedings were had:

Mr. GARVIN.—That is our case.

Mr. DAVIS.—Defendant now moves for an order of dismissal on the ground of insufficiency of the evidence to hold him.

The COURT.—That motion is denied.

Mr. DAVIS.—Now, I want to renew the objection to the evidence of the transactions on the afternoon of the 8th which occurred in the absence of the defendant.

The COURT.—It will be denied.

Mr. DAVIS.—Exception.

TESTIMONY OF W. S. WEST, ON HIS OWN BEHALF.

W. S. WEST, defendant, being sworn, testified on his own behalf as follows:

"My name is W. S. West and I live at the Cliff House and have lived in this county for four years. I remember when the two witnesses, Simmons and Pickett came to my place the night of the 19th or early morning of the 20th of May, 1923. There were with them Maxine Dale, Pauline Marks and some taxi driver. Maxine Dale was in no way interested in the Cliff House. She was employed there at one time when I was sick at the Sanitarium. When they came there that night Simmons

(Testimony of W. S. West.)

and Pickett had been drinking. Simmons had a bottle in his hand and I went over to him and said, 'You will have to keep that out of sight or get out. I don't allow that [33] in here.' Later I saw him at another table flashing this bottle. He went over to some other party of guests. I spoke to him about it again and called him to one side because he was using improper language and a few moments later Pickett and Simmons left the place without taking the ladies along. Simmons was out there again the night of June 2d. He came alone that time, was in about the same condition as on the previous occasion but he had a fresh scratch on his face and there was blood on his face. He was intoxicated at that time. He had a bottle with him, pulled it out and got a little more boisterous than the other time and I put him out bodily. He asked if he could call a taxi and I told him he could and let him stay downstairs until the taxi arrived.

I served near beer and soft drinks at the place. I never instructed McKay or anyone else to sell Canadian beer or whisky. I did instruct him to not allow it around and if he saw it to call my attention to it. I don't know what occurred there the afternoon of June 8th as I was not there. When I went away I did not leave any beer or whisky in the refrigerator or any bottle labeled "Scotch Whisky." There has been no such bottle on the place to my knowledge."

(Testimony of W. S. West.)

Cross-examination by Mr. GARVIN.

"Before I began running the Cliff House I was a mechanic on Lew Adams' ranch running a caterpillar for him. I don't remember just the date that I took over the Cliff House. No one has any interest there with me. Witness McKay was employed by me as a waiter and Maxine Dale was in charge of the place when I was sick in the sanitarium. She never had anything to do with the place while I was there but was there looking after the sandwiches and cooking when I was gone. It is a [34] public place located south of Sunset Highway near Spokane. I never kept any whisky or beer on the place and never gave anyone permission to sell any there and I did not allow the guests to bring it there for themselves. Of course if they did not show it I had no way of knowing that they had it. On the 20th of May when Simmons and Pickett were out there Simmons had a little bottle and said to me, 'Oh, come on and be a good fellow and take a drink with me.' I said, 'Keep that out of sight.' I kept no small glasses out there to serve drinks of whisky in. I don't know whether there was any in the house or not. I know that I had none."

TESTIMONY OF MAXINE DALE, FOR DEFENDANT.

MAXINE DALE, called as a witness for the defendant, testified on his behalf as follows:

"My name is Maxine Dale and I live at the

(Testimony of Maxine Dale.)

Louvre Hotel in Spokane. I have lived there since last December. I met Simmons and Pickett at the Louvre Hotel on May 19, 1923. We stayed at the Louvre Hotel until 11:30 or 12:00 o'clock that night. Simmons had a bottle of whisky with him and we had some drinks, then we went out to the Cliff House. They suggested that we go out there and dance. We called a taxi and went. There were five of us counting the driver. We met Mr. West at the door and I introduced Pickett and Simmons. I had known Mr. West before that. We went up to the dance-hall and danced. The dining-room and dance-hall are upstairs. Simmons got out his bottle and we took some drinks up there, then West came up and told him he would have to keep his bottle out of sight. He had to tell him two or three times. Then Simmons and Pickett had some argument with West and they [35] (Simmons and Pickett) went away and left us there at the house. When we went there Simmons was pretty drunk. I don't think Pickett was so drunk but we all had been drinking. Pickett was drunk enough so it was noticeable. I was also there on June 2d when Simmons came out. He was very drunk and was noisy and boisterous and Mr. West put him out. During these two visits the witness McKay or Scott did not serve me or these two men any beer or whisky in my presence. We ordered beer and got Guilt Top near beer. I never saw beer like that in evidence in the refrigerator at the Cliff House."

(Testimony of Maxine Dale.)

Cross-examinatian by Mr. GARVIN.

"When Simmons and Pickett came to the Louvre Hotel the afternoon of May 19th I think Simmons said he had just come up from Texas. It was about 11:00 o'clock when he suggested that we go to the Cliff House."

Q. You say you were drinking prior to the time you went out there that night?

A. Yes, sir, we were drinking out of the bottle.

Q. Where was this at?

A. At the Louvre Hotel.

Q. At the Louvre Hotel. That is the hotel that you are in charge of, isn't it? A. Yes, sir.

Q. And in whose room was this drinking going on? A. Drinking in the dining-room.

Q. In the dining-room up there, and the officers, as I understand it, brought this bottle up there?

A. Yes, sir.

Q. As a matter of fact, were you not selling drinks up there for fifty cents a drink?

A. No, sir.

Mr. DAVIS.—Objected to as immaterial and not proper cross-examination.

The COURT.—Overruled.

Mr. GARVIN.—Your answer to that is no?

A. No, sir, I did not. [35½]

Q. You did not sell either Mr. Pickett or Mr. Simmons any whisky up there? A. No, sir.

(Argument by Mr. Garvin.)

(Argument by Mr. Davis.)

(Reply by Mr. Garvin.)

(Charge to the Jury.)

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

State of Washington,
County of Spokane,—ss.

I, J. Stanley Webster, United States District Judge for the Eastern District of Washington and the Judge before whom the above-entitled action was tried, to wit: the cause entitled United States of America vs. W. S. West et al., defendants, which is one C–4308 in said district court, DO HEREBY CERTIFY, that the matters and proceedings embodied in the foregoing bill of exceptions, together with the proposed amendments thereto filed by the United States of America, are matters and proceedings occurring in the said cause and the same are hereby made a part of the record therein; and that the above and foregoing bill of exceptions contains all the material facts, matters and proceedings heretofore occurring in said cause and not already a part of the record therein; and contains all the material evidence oral and in writing therein, and that the above and foregoing bill of exceptions was duly and regularly filed with the clerk of the said court and thereafter duly and regularly served with the time authorized by law; and that no amendments were proposed to said bill of exceptions excepting such as are embodied therein; that due and regular [36] written notice of application to the Court for settlement and certifying said bill of exceptions was made and served upon the plaintiff, which notice specified the place and time (not less

than three days nor more than ten days after the service of said notice) to settle and certify said bill of exceptions.

Dated at Spokane, Washington, this 31st day of March, A. D. 1924.

J. STANLEY WEBSTER,
Judge. [37]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. C–4308.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

W. S. WEST et al.,
Defendants.

STIPULATION AND ORDER EXTENDING TIME TO AND INCLUDING APRIL 20, 1924, TO FILE RECORD AND DOCKET CAUSE.

Comes now Edward A. Davis, Attorney for the above-named defendant, and H. Sylvester Garvin, Assistant United States Attorney for the Eastern District of Washington, on behalf of the plaintiff above named, and it is hereby STIPULATED and AGREED between the parties that the defendant above named may have up to and including the 20th day of April, 1924, in which to complete his record

on appeal to the Circuit Court of Appeals, including his petition for a writ of error, etc.

H. SYLVESTER GARVIN,
Assistant United States Attorney,
Attorney for Plaintiff.
E. A. DAVIS,
Attorney for Defendant.

Upon reading the stipulation above, it is hereby

ORDERED that the above-entitled case be continued over the term in accordance with the stipulation in order that the defendant may perfect his appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit.

Done in open court this 31st day of March, A. D. 1924, at Spokane, Washington.

J. STANLEY WEBSTER,
Judge.

Filed in the U. S. District Court, Eastern District of Washington. Apr. 1, 1924. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [38]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

C–4308.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

W. S. WEST et al.,
Defendants.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

Please make up and certify to the Circuit Court of Appeals, 9th Judicial Circuit, the following papers and records in the above-entitled cause:

1. Information.
2. Verdict of the jury.
3. Motion for new trial.
4. Order denying new trial.
5. Judgment and sentence.
6. Bail bond on appeal.
7. Application for extension of time to file appeal.
8. Order extending time of appeal to January 20, 1924.
9. Order extending time of appeal to February 15, 1924.
10. Petition for writ of error.
11. Assignment of error.
12. Order allowing writ of error.
13. Writ of error.
14. Citation.
15. Bill of exceptions and certificate.
16. Stipulation allowing extension to April 20, 1924, to complete appeal.
17. Praecipe for transcript of record.

EDWARD A. DAVIS,
Attorney for W. S. West.

Filed in the U. S. District Court, Eastern Dist. of Washington. Apr. 16, 1924. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [39]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Eastern District of Washington,—ss.

I, Alan G. Paine, Clerk of the District Court of the United States in and for the Eastern District of Washington, do hereby certify that the foregoing typewritten pages numbered from one to thirty-nine inclusive, constitute and are a full, true, correct and complete copy of so much of the record, pleadings, orders and other proceedings had in said action, as the same remain of record and on file in the office of the clerk of the said District Court, as called for by the defendant and plaintiff in error in its praecipe; and that the same constitute the record on writ of error from the judgment of the District Court of the United States in and for the Eastern District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California, which writ of error was lodged and filed in my office on April 16th, 1924.

I further certify that I hereto attach and herewith transmit the original writ of error and the original citation issued in this cause.

I further certify that the fees of the clerk of this court for preparing and certifying to the foregoing typewritten record amount to the sum of eighteen dollars and thirty-five cents ($18.35), and that the same has been paid in full by Edward A. Davis, attorney for defendant and plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at Spokane, in the said District, this 19th day of April, A. D. 1924.

[Seal] ALAN G. PAINE,
Clerk. [40]

[Endorsed]: No. 4248. United States Circuit Court of Appeals for the Ninth Circuit. William S. West, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

Received April 23, 1924.

F. D. MONCKTON,
Clerk.

Filed May 5, 1924.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 4248

United States
Circuit Court of Appeals
For the Ninth Circuit

WILLIAM S. WEST,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Plaintiff in Error

Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

EDWARD A. DAVIS,
Attorney for Plaintiff in Error,
Pasco, Washington.

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STATEMENT OF THE CASE

This action comes up on Writ of Error sued out from the United State District Court of the Eastern District of Washington, Northern Division, in a case in which the plaintiff in error was convicted upon five counts of selling intoxicating liquor and of maintaining a nuisance. The questions involved are purely questions of evidence.

ASSIGNMENT OF ERROR

I.

The trial court erred in sustaining the objection to evidence as found on page 29 of the Transcript, being a part of the testimony of the witness J. M. Simmons. The evidence, objections and rulings being as follows:

Question: Now, give me the list of the names of the persons that you met at these eight or ten places--how many places were there?

Answer: I said between eight and ten.

Q. Between eight and ten. That must have been nine, then; that is the only number between eight and ten, isn't it? Now, give me the names of the persons that you met at those nine places.

A. If there is any of the cases that are still pending I would rather not answer.

Q. I do not care what you would rather do, I am asking you a question.

A. Why there is--

Mr. Garvin: If the Court please, I cannot see the competency of this testimony in reference to all the places he visited during that period of time.

Mr. Davis: It goes to the credibility of the witness.

The Court: The objection is sustained.

Mr. Davis: Exception.

II.

The trial court erred in overruling the objection of the defendant to evidence as found on page 35 of the Transcript of Record, being a part of the testimony of the witness James D. Scott; the evidence, objections and ruling being as follows:

Q. Whom were you employed out there by?

A. By Mr. West.

Mr. Davis: I object as calling for a conclusion.

The Court: Overruled.

Mr. Garvin. Q.: What were your duties out there, Mr. Scott?

Mr. Davis: Objected to as immaterial.

The Court: Overruled.

Mr. Davis: He might have done his duties or might not.

Mr. Garvin: I asked him what they were.

The Court: I will overrule the objection.

A. I was a waiter.

Witness: My services ceased out there about the end of July.

Q.: About the last of July. What were your general

duties there on those premises?

Mr. Davis: Objected to as immaterial.

The Court: Overruled.

Mr. Davis: Exception.

III.

The trial court erred in overruling the objections of the defendant to evidence and in denying the motion of the defendant to strike certain testimony as found on pages 35 and 36 of the Transcript of Record. The part of the record disclosing said overrulings being as follows:

Witness: I remember Mr. Simmons and Mr. Pickett being out there. I cannot recall the dates but I remember what they did out there. They did the same as anyone else. On one occasion they walked out there through the rain in the afternoon.

Mr. Davis: Just a moment that refers again to the time when the defendant was not there and I object to it.

The Court: Overruled.

Mr. Davis: Now, I want to renew the objection to the evidence of the transactions on the afternoon of the 8th which occurred in the absence of the defendant.

The Court: It will be denied.

Mr. Davis: Exception.

The last order relates back to the testimony of the witness Simmons as found on page 28 of the transcript, which is as follows:

Witness: "I went out again on June 8th in the afternoon with Agent Picketts. We purchased Scotch whiskey and beer At this time I purchased three drinks of Scotch whiskey and twelve drinks of Canadian beer. They

were served to us by Jerry McKay. The defendant West was not there at that time."

Mr. Davis: The defendant objects to the testimony of what occurred when he was not there and moves that it be stricken and the jury instructed to disregard it.

The Court: I will reserve my ruling until all the testimony is in, and you may renew your motion.

IV.

The trial court erred in overruling objections to evidence of the witness Maxine Dale as found on page 40 of the Transcript of Record. The testimony, objections and rulings being as follows:

Q.: As a matter of fact, were you not selling drinks up there for fifty cents a drink?

A.: No, sir.

Mr. Davis: Objected to as immaterial and not proper cross-examination.

The Court: Overruled.

Mr. Garvin: Your answer to that is no?

A.: No, sir, I did not.

Q.: You did not sell either Mr. Pickett or Mr. Simmons any whiskey up there?

ARGUMENT

Taking up these assignments of error in the order above mentioned, I have the following to submit.

The first assignment of error goes to a ruling sustaining objection of the prosecutor to questions asked by the defendant's counsel for the purpose of testing the credibility of the witness. This witness was one who had been employed in the capacity of an informer, or

perhaps a little more than an informer It was his business to visit places suspected of violating the liquor law and secure evidence of such violation and then appear as a witness against the accused party. According to his testimony he had, during his brief stay in Spokane, visited a number of places. He had given testimony as to the persons who were seen by him at the road house conducted by the defendant; and for the purpose of ascertaining how much credit should be attached to his testimony the defendant's counsel asked him the question, "Now, give me the list of names of the persons that you met at these eight or ten places." This question was objected to and the objection sustained.

Transcript of Record, Page 29.

I cannot help thinking that the trial court, in making this ruling failed to comprehend the purpose and effect of the question as propounded. Nothing is better settled as a rule of evidence than this: That where a witness testifies to any facts coming to his knowledge during a course of conduct, or during a series of actions on his part, he may for the purpose of testing his reliability be interrogated as to other facts which occurred or came to his knowledge in the same course of conduct or action.

As a general principle of evidence this proposition will not be questioned. How then can the ruling made by the trial court in this instance be approved. It is especially important that a degree of lattitude be allowed in the cross-examination of witnesses of this character. They are employed as informers and for the purpose of

securing convictions of those who violate the liquor law. Their procedure is to go into a locality, secure the list of those who have the reputation of being violators of the liquor law and then go about it to obtain convictions in all of those cases. They start with the theory that these people are guilty and that any means of securing their conviction is justified. Prosecutors and courts take the position very commonly that every assistance must be given to these informers or investigators, that the defendants will of course deny their guilt, and the presumption is indulged that all the defendants accused of liquor violation will necessarily commit perjury, and further, that the testimony of the informers is necessarily true.

The writer of this argument has personal knowledge of two cases in one of which an appeal was taken from the conviction of liquor violation; in the other of which a fine of $500.00 was paid and a jail sentence of ten months is just being completed. In both cases the convictions were had upon perjured testimony. These were not cases in which the writer was interested, but they are cases in which I know whereof I speak. They were both cases in which the defendants had been law violators. This is not questioned. But the crimes of which they were convicted never were committed. The things which were testified to by government informer never happened.

It is by reason of my personal knowledge of such things and by reason of the growing tendency on the part of prosecutors and trial courts to aid in the convic-

tion of those charged with liquor violation, regradless of the character of the informers, regardless of the absolute helplessness of the accused, that I wish to emphasize this particular part of my argument.

The informer, J. M. Simmons, whose testimony is now under consideration, swore that he and the informer Pickett visited nine or ten places for this same purpose at or about the same time which he was testifying about. He goes into details as to the names of those who were present at the defendant's place, what occurred there, who was drinking and who was buying and who was selling drinks. The cross-examination was for the purpose of ascertaining whether he could testify in the same manner as to the details of his other visits to other places made about the same time. If he could not, why not? In his evidence he intimated that there are other cases still pending. Is it reasonable to suppose that his memory would serve him for the purpose of giving the details of each case when it came up for trial, but that he could not remember such details in the other cases until it came time for their trial. This, of course is not true. Either he remembers these things or he doesn't remember them, and certainly the question propounded was a proper one for the purpose of ascertaining whether he does remember the facts or whether he manufactures facts in each case as he comes to it. The cross-examination should be permitted.

II.

The second assignment of error is based upon the action of the trial court in overruling defendant's objection

to the testimony of the witness James D. Scott when he was asked the question, "What were your general duties there on those premises?" This is a question of evidence and of agency. The witness Scott was an employee of the defendant. He might have been asked to give the terms and conditions of his employment; that is, he might have been asked to set out his contract of employment, whether it were oral or written. He might also have been asked what he did as an employee of the defendant, but he was not asked either of these questions. He was asked the question, "What were your general duties there on those premises?" In other words the agent of the defendant was asked to give his interpretation or opinion as to what were his duties or powers under his agency. This, I believe, the court will agree with me cannot be done under the rule of evidence, which rule is: That an agent cannot testify as to what are his duties or powers. The objection was interposed and was overruled, and I again insist that the trial court was in error.

III.

The third assignment of error is based upon the following state of facts. The informer testified that he went out to the road house conducted by this defendant, that the defendant was not there, but that the witness Scott sold them liquor. At the time the question first arose the trial court reserved his ruling but allowed the question to be answered; undoubtedly for the purpose of ascertaining later on whether or not the witness Scott in selling the liquor was acting under instructions from the defendant. So that this question is more or less interlocked with the question submitted under the second as-

signment of error; that is, if it had been proven in a proper manner that the witness Scott, when he sold liquor, even though the defendant were not present, was acting under instructions from the defendant, then the proof would have been proper. But no such evidence was produced, consequently when at the end of the government's testimony the objection was renewed to the evidence of any transaction which occurred in the absence of the defendant, that objection should have been sustained.

The objection is first found on page 28 of the Transcript of Record and was renewed on page 36 of the Record. This evidence was of transactions had between the informers and the witness Scott, when the defendant was not present and there is no proper proof that the witness was acting under instructions of the defendant, or that the defendant knew what the witness Scott was doing, and yet, this evidence was received for the purpose of convicting the defendant of guilt and doubtless it was the cause of the defendant being so convicted, regardless of the fact that so far as the proof goes he had no knowledge of what Scott was doing, had given Scott no instructions, and was not on the premises at the time.

IV.

The fourth assignment of error is based upon the action of the trial court in overruling an objection to the question propounded to the witness Maxine Dale. "Q.: As a matter of fact were you not selling drinks up there for fifty cents a drink?" Maxine Dale was a witness produced on behalf of the defendant. The question objected to is found on page 40 of the Transcript of Recrd. This

witness was one of those who went out to the road house of the defendant in the company of the informers. She testified in contradiction of the stories told by the informers. The evidence shows that the informers had first been at her house and had gone from her house, or rather her hotel in Spokane to the roadhouse of the defendant, a distance of several miles. On cross-examination the prosecutor asked her the question whether or not she had herself been selling liquor at the hotel operated by her in Spokane. This question could have but one possible purpose, and that is to discredit the witness by showing that at some other time and place she had herself violated the same law. Under the rule of evidence her credibility as a witness might be questioned by asking her whether or not she had been convicted of a crime, but no such question is put. The prosecutor simply asked her the question whether or not she had committed an offense. No one who has had anything to do with the trial of cases or with receiving or rejecting evidence, will for a single instant contend that such evidence is proper for the purpose of impeachment. That is the only purpose for which it was offered and doubtless for the effect which it had upon the minds of the jurors, and it was highly improper.

For the reasons above set out I believe that the rulings of the trial judge were erroneous and prejudicial as to each of the assignments of error and that the judgment should be reversed.

Respectfully submitted,

EDWARD A. DAVIS,

Attorney for Plaintiff in Error.

IN THE

United States

Circuit Court of Appeals

For The Ninth Circuit

WILLIAM S. WEST,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

No. 4248.

Brief of Defendant In Error

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COLE PRINTING COMPANY

IN THE

United States
Circuit Court of Appeals
For The Ninth Circuit

WILLIAM S. WEST, *Plaintiff in Error,* *vs.* UNITED STATES OF AMERICA, *Defendant in Error.*	No. 4248.

Brief of Defendant In Error

After reading the Brief of the Plaintiff in Error we are constrained to say that not one of the several assignments arise to the dignity of an error. However, assuming for the sake of the argument, that the Court did err in all of the four assignments specified, was there such prejudicial error that the defendant was thereby prevented from having a fair and impartial trial, and which compels this Court to reverse the case.

> RULE STATED: "In order to warrant a reversal it is a well recognized rule that the error complained of must have been prejudicial to the appellant."

2 *R. C. L.*, Sec. 195, page 230, cases cited under Note 16;

17 *C. J.*, Sec. 3600, page 272, cases cited under Note 2;

Myers vs. U. S., 223 F., 919.

We will proceed to further discuss the errors assigned, *seriatim*.

I.

In counsel's First Assignment of Error he stresses the fact that he was deprived of his absolute right to fully cross-examine the witness Simmons.

On page 4, of his Brief, counsel says:

> "The fiirst assignment of error goes to a ruling sustaining objection of the prosecutor to questions asked by the defendant's counsel for the purpose of testing the credibility of the witness. This witness was one who had been employed in the capacity of an informer, or perhaps a little more than an informer. It was his business to visit places suspected of violating the liquor law and secure evidence of such violation and then appear as a witness against the accused party. According to his testimony he had, during his brief stay in Spokane, visited a number of places. He had given testimony as to the persons who were seen by him at the road house conducted by the defendant; and for the purpose of ascertaining how much credit should be attached to his testimony the defendant's counsel asked him the question, *'Now, give me the list of names of the persons that you met at these eight or ten places.'* This question was objected to and

the objection sustained. (Transcript of Record, page 29.)

I cannot help thinking that the trial Court, in making this ruling failed to comprehend the purpose and effect of the question as propounded. Nothing is better settled as a rule of evidence than this: That where a witness testifies to any facts coming to his knowledge during a course of conduct, or during a series of actions on his part, he may for the purpose of testing his reliability be interrogated as to other facts which occurred or came to his knowledge in the same course of conduct or action."

First, let us examine the record. Turning to page 29 of the Transcript, we find the following:

"Question—Now, give me the list of the names of the persons that you met at these eight or ten places—how many places were there?

Answer—I said between eight and ten."

Thus, the record shows that the very thing the counsel complains about never existed, because the question asked was fully answered by the witness.

The examination proceeds:

"Q. Between eight and ten. That must have been (26) nine, then; that is the only number between eight and ten, isn't it? Now, give me the names of the persons that you met at those nine places.

A. If there is any of the cases that are still pending, I would rather not answer.

Q. I do not care what you would rather do, I am asking you a question.

A. Why, there is—

MR. GARVIN. If the Court please, I cannot see the competency of this testimony in reference to all the places he visited during that period of time.

MR. DAVIS. It goes to the credibility of the witness.

THE COURT. The objection is sustained.

MR. DAVIS. Exception."

What then is the question that counsel asked, that was objected to, objection sustained by the Court, and exception taken? Certainly not the question quoted in the Assignment of Error and the Argument (pages 1 and 5, Brief), because, as the record shows, that was fully answered.

If the question which counsel refers to, and about which he is now complaining that the Court erroneously sustained an objection to, is this one:

> *"Now, give me the names of the persons that you met at those nine places."* (Page 29, Transcript of Record.)

Then we say that the question was incompetent, irrelevant and immaterial, and the Court committed no error in sustaining an objection thereto. The question asked of the witness went only to the names of the persons whom witness met or saw in "those nine

places" he visited besides the defendant's. As to who those persons were or their identity could throw no light upon the witness' condition. If it was counsel's purpose by his cross-examination to elicit information which would have advised the jury as to witness' condition at the time he testified of having made the various purchases of liquor at defendant's place of business, the same could have been ascertained by counsel asking questions which would have made that plain. For instance, counsel could have asked the time which these various places were visited with respect to the time that witness testified he purchased the liquor from the defendant, the number of drinks consumed at each place, and the character of the liquor obtained, and what effect the drinking of this quantity of liquor had upon the witness' powers of observation and memory at the time he testified that he visited defendant's place of business. Testimony on these points might have been proper for the jury to determine whether or not the witness could intelligently comprehend what he obtained from the defendant. For instance, if counsel could show from the witness' testimony that at any of the times he visited the defendant's place of business he had consumed such quantities of liquor within close proximity of that time the jury could well find that he must have been so intoxicated as to not be able to clearly recall what took place in the defendant's place of business, and could well reject the testimony of the witness in that regard as unreliable. The identity of the persons

whom witness met at those other "nine places" would not bear upon his credibility. But the condition he was in at the time he went into the defendant's place of business would. It would not make any difference how many persons he had met but the number of drinks he had probably would.

By no stretch of argument or imagination can it be said that it appears from this record that the substantial rights of the defendant have been invaded calling for a reversal.

17 *C. J.*, Sec. 3657, pages 312-313.

Or that counsel has brought himself within the absolute right doctrine of cross-examination.

King vs. U. S., 112 F., 988;
Harrold vs. Oklahoma, 169 F., 47;
Kisner vs. U. S., 231 F., 856;
Kirk vs. U. S., 280 F., 506;
Gallaghan vs. U. S., 299 F., 172.

Even admitting for argument's sake that the Court erred in sustaining the objection to the above question it was not prejudicial.

> "Rulings upon questions asked a witness upon cross-examination, although erroneous, will not necessitate a reversal where no substantial prejudice results therefrom."
>
> 17 *C. J.*, Sec. 3657, page 312, cases cited in Note 44.

But why pursue the argument further? We think we have fully demonstrated to this Court by counsel's own argument and Record that defendant was not deprived of his right to fully cross-examine the witness Simmons on all material and pertinent matters. If defendant suffered any deprivation of that right it was due solely to his own counsel failing to properly pursue the cross-examination, and not to any arbitrary or erroneous ruling of the trial Court.

II.

Overruling the objection to the question propounded by Mr. Garvin (counsel for plaintiff), to the plaintiff's witness Scott (page 8, Brief, Plaintiff in Error), namely:

> *"What were your general duties on those premises?"*

We desire to call attention to the fact that as shown by the record (page 35), that question was never answered by the witness, nor any answer insisted upon by the counsel for the government. There being no answer, certainly there could be no prejudice to the defendant. By his own record there is no merit in this Assignment of Error.

III.

> *"The informer (I assume Counsel means Government witness Simmons), testified that he went out to the road house conducted by the defendant,*

that defendant was not there, but that the witness Scott (alias McKay) sold them liquor." (Page 8, Brief, Plaintiff in Error.)

From counsel's argument he would have it appear that the Government's whole case rested on this one single transaction, which was on the afternoon of June 8th, 1923 (pages 28, 30 and 35, Transcript of Record), that is, that the liquor was sold in defendant's road house by his waiter Scott, alias McKay, in defendant's absence; that there was no evidence of direct sales by or in the presence of defendant.

The record does not sustain this contention. The witness Simmons testified that he first met the defendant at his road house, known as the Cliff House (about five miles west of Spokane), on May 19th, 1923. He went there "accompanied by Agent Pickett, and a lady by name of Maxine Dale, and a taxicab driver and a woman named Pauline Marks." (Page 28, Transcript of Record.) He further testifies as to being out there on later dates, namely, morning of May 20th, night of June 2nd (on this occasion alone), and on afternoon of June 8th. He further testifies that "on each occasion" he purchased liquor from said Scott, alias McKay, the defendant being there on said first occasion, May 19th. (Pages 28-29, Transcript of Record.) Government witness Pickett also testified he "met him (defendant) first on May 19th, 1923," at said Cliff House. Was with Agent Simmons, Maxine Dale, Pauline Marks, and a taxi driver. "We bought Scotch whiskey and Canadian beer, both of

which contained more than one-half of one per cent alcohol in volume." (Page 30, Transcript of Record.) James D. Scott, alias Jerry McKay, also a witness for the government, testified that he was employed by the defendant as a waiter during the months of May and June, 1923, at said Cliff House. "I remember Mr. Simmons and Mr. Pickett being out there. I cannot recall the dates but I remember what they did out there. They did the same as anyone else." (Pages 34-35, Transcript of Record.) The defendant testified in his own behalf. "I live at the Cliff House and have lived in this county for four years. I remember when the two witnesses, Simmons and Pickett came to my place the night of the 19th or early morning of the 20th of May, 1923. There were with them Maxine Dale, Pauline Marks and some taxi driver." (Page 36, Transcript of Record.)

From the above testimony it must be apparent to the Court that counsel is very much mistaken when he says, referring to the sale made by McKay on June 8th, in the absence of the defendant, that "this evidence was received for the purpose of convicting the defendant of guilt and doubtless it was the cause of the defendant being so convicted, * * *." (Page 9, Brief of Plaintiff in Error.) The record conclusively shows that liquor was purchased at defendant's place of business on three separate and different dates prior to said June 8th, and "doubtless it was" that these three separate and different prior occasions when liquor was sold when defendant was present at his

place of business were "the cause of the defendant being so convicted, regardless of the fact that so far as the proof goes he (defendant) had no knowledge of what Scott was doing, had given Scott no instructions, and was not on the premises at the time," namely, on June 8th, which is the only time the evidence shows the defendant was not there when the liquor purchases were made by the government witnesses, Simmons and Pickett. There is also no merit in this Assignment of Error.

IV.

Counsel's fourth and last Assignment of Error is based upon the trial Court overruling an objection to the question propounded on cross-examination to the defendant's witness Maxine Dale:

> *"Q. As a matter of fact, were you not selling drinks up there for fifty cents a drink?"*

This witness had previously testified on direct that she was living at the Louvre Hotel, in Spokane. That the government witnesses, Simmons and Pickett, were at the hotel. That she had drank whisky with them there. That afterwards she and the said witnesses went out to the defendant's place of business. All of this occurred on May 19th, 1923. (Page 39, Transcript of Record.)

On cross-examination she testified:

> "Q. You say you were drinking prior to the time you went out there that night?

A. Yes, sir, we were drinking out of the bottle.

Q. Where was this at?

A. At the Louvre Hotel.

Q. At the Louvre Hotel. That is the hotel that you are in charge of, isn't it?

A. Yes, sir.

Q. And in whose room was this drinking going on?

A. Drinking in the dining room.

Q. In the dining room up there, and the officers, as I understand it, brought this bottle up there?

A. Yes, sir.

Q. As a matter of fact, were you not selling drinks up there for fifty cents a drink?

A. No, sir.

MR. DAVIS. Objected to as immaterial and not proper cross-examination.

THE COURT. Overruled.

MR. GARVIN. Your answer to that is no?

A. No, sir, I did not.

Q. You did not sell either Mr. Pickett or Mr. Simmons any whisky up there?

A. No, sir." (Page 40, Transcript of Record.)

In counsel's brief he states (page 10) that:

> "This question could have but one possible purpose, and that is to discredit the witness by showing that at some other time and place she had herself violated the same law."

The counsel complains that the question was improper cross-examination, and the Court's refusal to sustain an objection thereto, reversal error.

We do not agree with counsel. It is our understanding of the law that:

> "The previous conduct of the witness, his life and associations, whether irreproachable or the reverse, are all relevant. Every person possesses, to a certain extent, the power of selecting his domicile and avocation. So the choice of his business and social connections, the circle of his friends and acquaintances, and his general mode and course of living are largely in his own control. If, therefore, he voluntarily associates with those who are engaged in disreputable pursuits, or if he is addicted to disgraceful or vicious practices, or follows an occupation which is loathsome and vile, though not perhaps criminal, no rule of law prevents such facts from being shown to determine his credibility, by questions put to him upon his cross-examination. And often he may be questioned as to specific facts in his past career which may tend to his disgrace, provided they are not too remote in point of time."
>
> Sec. 387, Underhill's Criminal Evidence, 3rd Ed., p. 554.

Speaking further on this same subject the above author says, beginning at page 553:

> "It is impossible to formulate any general rule by which can be determined the relevancy of questions upon cross-examination. The matter is largely in the judicial discretion. It may with safety be said that the Court ought to interfere whenever necessary to protect the witness from needless insult and contumely, and to forbid impertinent questions which are altogether irrelevent, and have been asked merely to surprise, annoy and confuse the witness, and to cause him to lose his temper. Subject to this limitation the law regards as relevant all facts which tend to illustrate the credibility of the witness or which may enable the jury to determine the weight of his testimony."

Counsel for the government was clearly within his rights and the Court did not abuse its discretion in overruling the objection.

But besides all this, if it can be said that the Court was in error in overruling the objection, again no prejudicial harm has been shown to have been done the defendant, because the record shows that to that question the witness answered, "No, sir." Certainly it cannot be argued that the jury disbelieved the witness and found the defendant guilty because they thought the witness was not telling the truth.

No substantial prejudice resulted to the defendant from this ruling of the Court.

17 *C. J.*, Sec. 3657, page 312.

In conclusion, we desire to say that the record in this case shows that the defendant had a full, fair and impartial trial. He offered himself as a witness

and was given full opportunity to meet the charge against him. And we challenge the counsel to search the record and point out where any of the substantial rights of the defendant were invaded, either by the counsel for the government or the trial Court.

We respectfully submit that upon the record in this case the judgment of the Court should be affirmed.

FRANK R. JEFFREY,
United States Attorney,

LEE C. DELLE,
Assistant United States Attorney,
Attorneys for Defendant in Error.

No. 4249

United States

Circuit Court of Appeals

For the Ninth Circuit.

BEET GROWERS SUGAR COMPANY, a Corporation,

Appellant,

vs.

COLUMBIA TRUST COMPANY, a Corporation, as Trustee, E. D. HASHIMOTO, Intervenor, and A. V. SCOTT, Receiver,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Idaho, Eastern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4249

United States

Circuit Court of Appeals

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the District of Idaho, Eastern Division.

IN EQUITY—No. 364.

COLUMBIA TRUST COMPANY, as Trustee,
Plaintiff,

vs.

BEET GROWERS SUGAR COMPANY and FORT DEARBORN TRUST & SAVINGS BANK, as Trustee,
Defendants.

COMPLAINT.

Columbia Trust Company, a corporation organized and existing under the laws of the State of Utah and a citizen of said State, having its principal office at Salt Lake City, in said State, brings this its bill of complaint against Beet Growers Sugar Company, a corporation organized and existing under the laws of the State of Idaho, and a citizen and resident of said State, having its principal office in the City of Rigby, in the County of Jefferson, in said State, and, for cause of action against the said defendant, alleges:

I.

That at all the times hereinafter mentioned, the plaintiff was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Utah and is a citizen and resident of said State, having its principal residence and place of business therein in the city and county of Salt

Lake; that at all the times hereinafter mentioned, the said defendant, Beet Growers Sugar Company, was and now is a citizen and resident of the State of Idaho, having its principal office and place of business in the city of Rigby, County of Jefferson, in said State.

II.

That this suit is one of a civil nature, in equity, between citizens of different states, and that the amount in controversy herein exceeds the sum or value of Three Thousand Dollars ($3,000.00), exclusive of interest and costs. [1*]

III.

That on, to wit: the 1st day of October, A. D. 1919, the defendant, Beet Growers Sugar Company, in the exercise of its corporate power and pursuant to resolutions theretofore duly adopted by its board of directors, at a meeting thereof regularly called and held, made and executed as of said date its first mortgage, seven per cent (7%), gold bonds in the aggregate principal amount of Five Hundred Thousand Dollars ($500,000.00) of which two hundred fifty (250) bonds, numbered 1 to 250 inclusive, for the principal amount of One Thousand Dollars ($1,000.00) each, were designated as "Series A"; four hundred (400) bonds, numbered 1 to 400 inclusive, each for the principal amount of Five Hundred Dollars ($500.00), were designated as "Series B"; and five hundred (500) bonds, numbered 1 to

*Page-number appearing at foot of page of original certified Transcript of Record.

500 inclusive, each for the principal amount of One Hundred Dollars ($100.00), were designated as "Series C"; that in and by each of said bonds, the said Beet Growers Sugar Company promised and agreed to pay to "the bearer," or, if registered, to the registered holder thereof, on the 1st day of October, 1929, at the office of the plaintiff herein, in Salt Lake City, Utah, or at The Hanover National Bank, in the city and county of New York, the amount stated therein, in gold coin of the United States of America, of or equal to the then present standard of weight and fineness, and also to pay the interest thereon semi-annually at the said office of the plaintiff herein or at the said The Hanover National Bank, at the rate of seven per cent (7%) per annum, in like gold coin, on the 1st days of April and October of each year, on presentation or surrender of the interest coupons attached to said bonds as they severally mature; that the form and tenor of said bonds so executed and issued by the said defendant are more particularly set forth in the copy of the deed of trust and mortgage executed by the defendant, as security for the payment thereof, to which reference is hereinafter made. [2]

"Defendant Beet Growers Sugar Company executed its deed of trust and mortgage covering all its property, both real and personal for the security of its bonds." [3]

V.

That thereafter all of said bonds, aggregating Five Hundred Thousand Dollars ($500,000.00) in

principal amount, as aforesaid, were duly authenticated by indorsement thereon of the certificate of plaintiff herein, as trustee, and, pursuant to resolution of the board of directors of the defendant, Beet Growers Sugar Company, delivered by the plaintiff to said defendant, which, as the plaintiff is informed and believes, negotiated, sold, delivered and/or pledged all or substantially all of same to diverse persons, firms, partnerships and corporations, who thereby became and now are *bona fide* holders and purchasers thereof, for value. [4]

VII.

That there were listed and assessed by the duly constituted authorities of said Jefferson County taxes upon the property covered by said deed of trust and mortgage, hereinbefore particularly described, for the calendar year 1920, in the sum of approximately Twenty Thousand Five Hundred Dollars ($20,500.00) and for the calendar year 1921 in the sum of Sixteen Thousand Three Hundred Dollars ($16,300.00), which became delinquent on the fourth Monday in December in the years for which the said taxes were levied, respectively, and which have not been paid by the defendant company in whole or in part; that, with interest and penalties, the said taxes amount, at the date hereof, [7] to approximately Forty-four Thousand Dollars ($44,000.00), and are a lien upon said property prior and superior to that of the said deed of trust and mortgage; and, further, that, altho requested so to do, the defendant company has wholly failed to deposit with the plaintiff, as trustee, policies of

insurance, if any it has, upon the buildings and other improvements on said property, as required by the covenants in said deed of trust and mortgage hereinbefore set forth; in consequence whereof the plaintiff, at the request of the owners and/or legal holders of more than twenty-five per cent (25%) of the bonds secured by said indenture and now outstanding, has notified the defendant of its default in respect to the performance of its said covenants and of its, the plaintiff's election to declare, and the plaintiff does hereby declare, all of the bonds secured by said indenture and now outstanding, together with the accrued interest thereon, to be now due and payable, anything in said bonds or in said indenture to the contrary notwithstanding, and has made demand upon the defendant for payment thereof, with which demand the defendant has failed and refused to comply either in whole or in part; that, at the time of filing this complaint, the defendant is not advised as to the total amount of said bonds which have been negotiated by the defendant and now issued and outstanding, nor as to the amount of delinquent interest which is due on the bonds so issued and outstanding, and does not allege the same for that reason.

VIII.

That, in the course of its business operations during the past two years, the defendant has contracted a large amount of indebtedness to diverse persons and corporations, which it is wholly unable to meet owing to the fact that it has disposed of

all or practically all of its liquid assets and upon which there is grave danger of actions in attachment being commenced in the immediate future; and that, unless a receiver is appointed to [8] take possession and charge of the property covered by the lien of said indenture and the rents, issues and profits thereof, as provided in said deed of trust and mortgage, pending foreclosure of said deed of trust and mortgage, a material part of the value of said security and the priority of the lien thereof on the personal property covered thereby is liable to be lost or destroyed, and the beneficiaries under said deed of trust and mortgage will thereby be caused great and irreparable damage; for all of which reasons a receiver should be appointed to preserve the *corpus* as well as the rents, issues and profits of said property for the satisfaction of said indebtedness; that no proceedings at law or in equity for the collection of said indebtedness or the protection or foreclosure of said security, save this suit, have been taken or commenced by the plaintiff, nor, as it is informed and believes, by any holder of the bonds or interest coupons secured by said indenture, and that the plaintiff is proceeding herein to foreclose said deed of trust and mortgage and to exercise all the rights, powers and authority in it vested under and by virtue of said indenture, for the benefit of each and all the holders of the bonds secured thereby; that under and by virtue of the terms and provisions of said deed of trust and mortgage, the plaintiff is entitled to recover all sums expended or to be ex-

pended by it in connection with this suit and/or the protection of the right created thereby, including a reasonable attorney's fee and a reasonable compensation to itself for its services in this behalf and for which it is entitled to a lien upon the proceeds of said property in the event of sale of the same under decree of foreclosure, prior and superior to the said bonds and interest coupons thereto attached; and that, because of said defaults on the part of said defendant, the plaintiff has been compelled to employ attorneys to commence and prosecute this foreclosure proceeding and to protect the rights and interests of the holders of bonds secured by said deed of trust and mortgage and has agreed to pay the attorneys so employed by it such reasonable fee as the court may allow [9] in the premises; that a reasonable fee for such legal services rendered and to be rendered by attorneys for the plaintiff is the sum of Fifteen Thousand Dollars ($15,000.00), and that a reasonable compensation to be allowed the plaintiff for its services in this behalf is the sum of Ten Thousand Dollars ($10,000.00), together with its actual expenses in such behalf paid, laid out and expended.

WHEREFORE, the premises considered, and for as much as the plaintiff is without remedy at law and can have relief only in a court of equity, in which matters of this nature are properly cognizable, the plaintiff files this its bill of complaint, and prays that it be adjudged and decreed by this honorable court,

FIRST. That the deed of trust and mortgage so executed and delivered by the defendant Beet Growers Sugar Company to the plaintiff and under which the plaintiff is now trustee, as hereinbefore set forth, may be decreed to be a first lien upon all property, real, personal and mixed therein particularly described or subsequently acquired by the defendant, prior and superior to any and all liens or claims whatsoever, and that the said defendant, Beet Growers Sugar Company, may be adjudged and decreed to pay unto the plaintiff all moneys now due or to become due and payable on its said bonds and/or under its said mortgage and deed of trust, and that, in default thereof, all and singular the said mortgaged premises, with the appurtenances thereunto belonging or in any manner appertaining, and all other property subsequently acquired by the defendant and covered by the lien of said indenture, may be sold under decree of this honorable court, and that, out of the moneys arising from the sale thereof, after deducting the proceeds of any such sale, just allowance for all expenses of such sale, including attorneys' and trustee's fees and all expenses incurred by the plaintiff in the premises, whether in the way of payment of taxes and assessments on the said premises, or any part thereof, or otherwise, and to apply the remainder of the proceeds in the manner particularly provided in said indenture;

SECOND. That a receiver may be appointed to take possession [10] of said mortgage premises and personal property pending the foreclosure of

said deed of trust and mortgage, and during the period of redemption allowed by the defendant and its creditors, if any, according to the usual course and practice of this court, with the usual powers conferred upon receivers in like cases; that said receiver be empowered and directed to take possession of said property and to receive the rents, issues and profits thereof, to lease and/or operate all or any part of said property under the orders and direction of this court, and to account for any earnings received therefrom (after deducting the expense of operating the same, taxes, assessments and charges upon said property), and to hold and apply the same for the interest and benefit of the holders of said bonds, as provided in said deed of trust and mortgage and as directed by this court;

THIRD. That a writ of injunction may be issued pending final decree in this action, according to the practice and under the seal of this court, directing and commanding the defendant, its agents and employees to deliver possession of such mortgaged premises and personal property and to make such transfers thereof to the receiver to be appointed by this court as may be necessary to invest the said receiver with complete possession and control thereof, and also enjoining and restricting the said defendant, its agents, attorneys and employees, and all persons whomsoever, from interfering with the transfer, sell or other disposal of any of the property covered by said mortgage and deed of trust, or coming into the possession of the said receiver or from taking possession of, levying upon or at-

tempting to sell, either by judicial process or otherwise, any portion of the property placed in or covered by said mortgage and deed of trust;

FOURTH. That if, upon the foreclosure and sale of the mortgage property and premises, the same shall fail to realize a sum sufficient to pay the amount of the bonds aforesaid and the interest found to be due thereon, after deducting the cost and expense of executing its trust, that it may have judgment against the said defendant, Beet Growers Sugar Company as the maker of [11] said coupons and bonds, for whatever deficiency there may be in the payment thereof, with the right of execution; and for such further relief in the premises as the nature and circumstances of this suit may require, and as to this honorable court may seem *most* and proper.

PLAINTIFF FURTHER PRAYS, That a writ of subpoena may be issued out of and under the seal of this court directed to the said defendant, Beet Growers Sugar Company, therein and thereby commanding it, the defendant, at a certain time and under a certain penalty therein to be named, personally to appear before this honorable court, then and there to answer all and singular (but not under oath, answer under oath being hereby expressly waived) the matters aforesaid, and to stand, abide by and sustain such direction and decree as are

made herein and as to this court may seem equitable and just.

COLUMBIA TRUST COMPANY,
By WM. STORY, Jr.,
Its Vice-president.

WM. STORY, Jr.,
Address: Salt Lake City, Utah.
Solicitor for Plaintiff.

[Duly verified] [12]

EXHIBIT "A."

DEED OF TRUST AND MORTGAGE.

THIS INDENTURE, made and entered into this 20th day of April, 1920, by and between BEET GROWERS SUGAR COMPANY, a corporation duly organized and existing under the laws of the State of Idaho, hereinafter called the "Company," the party of the first part, and the Columbia Trust Company, a corporation of Salt Lake City, Utah, hereinafter called the "Trustee," the party of the second part, WITNESSETH:

WHEREAS, "Company" has full power and authority under its articles of incorporation, its by-laws and the laws of the State of Idaho, to borrow money, to make, execute, issue, deliver and dispose of the bonds hereinafter described, and to secure the payment of the principal sums of and interest upon all said bonds by Deed of Trust and Mortgage, as hereinafter provided, and to do, covenant and obligate itself to do and perform all

the things, matters and obligations hereinafter provided; and,

WHEREAS, it is necessary for the "Company" to borrow money for its corporate purposes and to issue its bonds therefor, and mortgage its real property hereinafter described to secure the payments of said bonds and to that end it has duly authorized and directed an issue of its bonds to the aggregate principal amount of FIVE HUNDRED THOUSAND ($500,000.00) Dollars, and

WHEREAS, The Board of Directors of the "Company" has, duly, regularly and lawfully authorized the issue of said bonds and the making, executing, delivering and disposing of the same and the making, executing, acknowledging and delivering of this indenture by its President and Secretary in the name of and for said "Company" and the affixing of the corporate seal of "Company" to said bonds at meeting of "Company" convened and held and said authorization appears in the minutes of the "Company" and, the action of said Board of Directors has been approved by the stockholders of the "Company," and [13]

WHEREAS, All things necessary to make the said bonds, when duly certified by the Trustee, valid, binding and legal obligations of "Company" and to make this indenture a valid, legal and binding instrument for the security of said bonds have been done and performed and the issue of said bonds as in this indenture provided has been in all respects duly authorized, and

WHEREAS, said bonds, so approved and authorized by said stockholders and board of directors of "Company" are to be issued in three series as follows, to wit:

Series A, numbering 250 bonds, each bond in the principal sum of One Hundred ($100.00) Dollars.

Series B, numbering 400 bonds, each bond in the principal sum of Five Hundred ($500.00) Dollars.

Series C, numbering 500 bonds, each bond in the principal sum of One Hundred ($100.00) Dollars.

And each of said bonds is to be substantially in words and figures as follows, to wit: [14]

"Copy of form of bonds authorized and description of property mortgaged." [15–24]

ARTICLE 2.

PARTICULAR COVENANTS OF "COMPANY."

"Company" hereby covenants, warrants and agrees:

Section 1. That it is lawfully seized and possessed in fee simple of all the aforesaid mortgage premises and property generally or specifically described herein, and that it has good right and lawful authority to mortgage the same as provided herein.

Section 2. "Company" will, so long as any of the bonds issued hereunder are outstanding maintain its corporate existence and will maintain, preserve, renew and secure all the rights, properties, powers, privileges and franchises by it owned and will not do or suffer anything whereby its right or authority to carry on its business or any

right, interest, privilege, or franchise owned or exercised by it shall be forfeited, nor will "Company" go or suffer itself to be put into bankruptcy or insolvency.

Section 3. "Company" will, upon reasonable request, execute and deliver, or cause to be executed and delivered, such further instruments and assurances and do or cause to be done, such further acts as may be necessary or proper to carry out more effectually, or make more secure, the purposes of this indenture, especially to make subject to the lien hereof any real property and interest therein or appurtenant thereto, now owned or hereafter acquired by it, and to transfer to any new trustee the estate, powers, instruments and funds held in trust hereunder. [25]

Section 4. "Company" will at all times maintain, preserve and keep its property, mortgage hereunder, and every part thereof, with the appurtenances and every part and parcel thereof, in good repair, working order and condition, and from time to time make all needful and proper repairs, so that at all times the value of the security of the bonds issued hereunder and the efficiency of the property hereby mortgaged shall be fully preserved and maintained.

Section 5. That it will keep all the property which is at any time covered by the indenture, fully insured, and will deliver to and deposit with said Trustee the policies of insurance.

Section 6. The company will pay and discharge before the same become delinquent, all taxes, as-

sessments, and other governmental charges, or other liens or charges, or other liens or charges lawfully imposed upon the property of premises at any time subject to the lien hereof, to the end that the priority of this indenture shall be fully preserved in respect to such property or premises.

Section 7. "Company" will pay the principal and interest of all the bonds issued hereunder according to the terms thereof, said payment to be made in gold coin of the United States of America of the present standard of weight and fineness, at the time, place and in the manner mentioned on said bonds, and will deliver to "Trustee" the amount of all payments of principal, and interest, ten days prior to the maturing thereof, without any deduction for any tax, charge or assessment. [26]

Section 8. "Company" will cause this indenture at all times to be kept recorded and filed as a mortgage, in order fully to preserve and protect the security of the bondholders and all rights of the "Trustee."

Section 9. "Company" will not suffer or permit any default to occur under this indenture, but will well and faithfully perform all the conditions, covenants and requirements hereof.

ARTICLE 3.

PROVISIONS FOR DEFAULT AND FORECLOSURE.

Section 1. In case (a) default shall be made in the payment of any of the principal or any of the interest money mentioned in the bonds and coupons

secured hereby, or any or either of them, and any such default shall continue for a period of three months, or (b) default shall be made by "Company" in the due observance or performance of any covenant, agreement, warranty or condition herein or in said bonds required to be kept by "Company," and any such default shall continue for three months, then after written notice thereof to "Company" from "Trustee" or from twenty-five per cent of the holders of all of the outstanding bonds secured by "Trustee," or its successors in trust, may, on its own motion, and shall upon written request of the holder or holders of twenty-five per cent in amount of the bonds hereby secured and then outstanding, declare the principal of all bonds hereby secured and then outstanding to be, and they shall thereupon immediately become due and payable, anything contained in said bonds or herein to the contrary notwithstanding, and may proceed to foreclose this indenture and to enforce by legal process the payment of said bonds and coupons by and against "Company," and to sell any or all of the property upon which this indenture shall be or create a lien or encumbrance, under the judgment or decree of a Court of competent jurisdiction. [27]

Section 2. In case of any legal proceedings to foreclose this indenture, the plaintiff or complainant therein shall be entitled to have the real property hereby granted and conveyed or intended so to be sold at judicial sale for or toward the satisfaction of the principal and accrued interest upon the outstanding bonds secured hereby and costs, disburse-

ments, and reasonable attorney's fees; and for the enforcement of the rights, liens and securities of "Trustee" and of the holders of bonds secured hereby; it is expressly understood that no incorporator, stockholder, officer or director shall be individually liable under any judgment secured.

Section 3. The purchase money, proceeds and avails of any such sale, and any moneys otherwise held by "Trustee" under any of the provisions hereof as part of the Trust estate, shall be applied as follows:

FIRST. To the payment of the costs and expenses of such sale and of any action or judicial proceeding including reasonable compensation of "Trustee," his agents, attorneys and counsel, and of all expenses, liabilities and advances made or incurred by the "Trustee" in managing, maintaining or operating the property hereby mortgaged, in discharging this trust and to the payment of all taxes, assessments or other liens superior to the lien of this indenture, except any taxes, assessments, or other superior liens to which such sales shall have been made subject.

SECOND. To the payment of the whole amount then unpaid upon the bonds hereby secured for principal and interest, and in case such proceeds shall not be sufficient to pay in full the whole amount so unpaid upon the said bonds, then to the payment of such principal and interest without preference or priority of principal over interest, interest over principal, or any installment of interest over any other installment of interest, ratably to the aggre-

gate of such principal and accrued [28] and unpaid interest.

THIRD. The surplus, if any, shall be paid to "Company."

Section 4. In case of any sale under the provisions hereof or by virtue of judicial proceedings, howsoever the same may have been instituted, whether for the foreclosure of this indenture or for any other purpose, any purchaser, for the purpose of making settlement or payment for the property purchased, shall be entitled to turn in any bonds, and any mature and unpaid coupons, hereby secured, on account of and as part of the purchase money, in order that there may be credited, as paid thereon, the sums payable out of the net proceeds of such sale to the holder of such bonds and coupons as his ratable share of such net proceeds, after allowing for the proportion of the total purchase price required to be paid in cash to pay the costs and expenses of sale and of such action or proceeding, or otherwise; and such purchaser shall be credited on account of the purchase price of the property purchased with the sum payable out of such net proceeds on the bonds and coupons so turned in; and at any such sale, any bondholders or "Trustee" may bid for and purchase such, or any of such, property and make payment therefor as aforesaid and upon compliance with the terms of sale, may hold, retain and dispose of such property without further accountability therefor.

Section 5. Upon filing a bill in equity or the commencement of any judicial proceedings to enforce any right of "Trustee" or of the bondholders

hereunder, "Trustee" shall be entitled to the appointment of a receiver of the property mortgaged and of the earnings, tolls, income, revenues, issues and profits thereof, with such power as the Court making such appointment shall confer. [29]

Section 6. No holder or holders of any bond or coupon hereby secured shall have any right to institute any suit, action or proceedings at law or in equity for the foreclosure of this indenture or for the execution of any trust hereof, or for any other remedy hereunder, unless the written notice to "Trustee" as hereinbefore provided shall have been given, and "Trustee" allowed a reasonable opportunity either to proceed to exercise the powers hereinbefore granted or to institute such action, suit or proceedings, nor unless also such holder or holders shall have offered to "Trustee" adequate security and indemnity against costs, expenses, and liabilities to be incurred therein or thereby, and "Trustee" shall have unreasonably refused to comply with such request.

Section 7. Except as herein expressly provided to the contrary, no remedy herein conferred upon or reserved to "Trustee" is intended to be exclusive of any other remedy, but is cumulative and in addition to every other remedy hereunder or now or hereinafter existing at law, in equity, or by statute, as no action by "Trustee" shall preclude further or other action or proceedings hereunder or under the laws of the United States or the State of Idaho.

Section 8. No delay or omission of "Trustee" or of any bondholder hereby secured to exercise any

right or power hereunder accruing upon any default, shall impair any such right or power, or shall be construed to be or constitute a waiver of any such default, or any acquiescence therein, but every remedy and power given hereby may be exercised from time to time and as often as may be deemed expedient by "Trustee" or the bondholders, as the case may be. [30]

"Duties of trustee defined. [31, 32]

ARTICLE 5.

RIGHTS AND OPTION "COMPANY."

Section 1. While not in default hereunder "Company" shall be suffered and permitted to possess, use, and enjoy, and dispose of the products of all the real property, or interests therein, conveyed by this indenture, and to receive and use the rents, issues, income, product and profits thereof.

Section 2. "Company" may in addition to the payment of maturing bonds, at its option, pay all or any part of the unpaid principal of this issue of bonds at any day any interest coupon matures and redeem any bond at face or par value, together with accrued interest thereon, to such date, and a premium of three (3) per cent of the principal upon sixty (60) days prior written notice to "Trustee" and the bondholders; of intention so to do, and remittance to "Trustee" of the amount of such payment ten (10) days prior to such designated day of redemption.

ARTICLE 6.

DEFEASANCE.

Section 1. If at any time "Company" shall deliver, or cause to be delivered to "Trustee" for cancellation, all of the outstanding bonds secured by, together with all unpaid interest coupons, or if, when all the bonds hereby secured shall have become due and payable, "Company" shall well and truly pay or cause to be paid, the whole amount of the principal thereof and interest thereon, and any other sums payable by "Company" hereunder, and shall well and truly keep and perform all the things herein required to be kept and performed by "Company" according to the true intent and meaning hereof, then all the real property, rights and interests hereby conveyed shall revert to the Company, and all rights of "Trustee" shall cease and determine, and the estate, right, title and interest of "Trustee" therein or thereto shall cease, determine and become [33] void and of no effect, and on demand of "Company," and at "Company's" cost and expense, "Trustee" shall enter satisfaction hereof upon the records; otherwise this indenture shall continue and remain in full force, virtue and effect.

IN WITNESS WHEREOF, said Beet Growers Sugar Company has caused these presents to be signed in its corporate name by its president and impressed with its corporate seal attested by its secretary and the said The Columbia Trust Company has caused these presents to be signed in its corporate name by its president and impressed with

its corporate seal attested by its secretary all as of the day, year first above written.

[Seal]

BEET GROWERS SUGAR COMPANY.
By JAMES H. HAWLEY,
President,
Party of the First Part.
Attest: A. W. GABBEY,
Secretary.

THE COLUMBIA TRUST COMPANY.
[Seal] By F. B. COOK,
President,
Party of the Second Part.
Attest: G. M. SPOONER,
Secretary. [34]

"Duly acknowledged." [35, 36]

[Title of Court and Cause.]

AMENDMENT TO BILL OF COMPLAINT.

Comes now the plaintiff, and by leave of the Court, amends its bill of complaint herein by adding thereto the following paragraph after the fourth paragraph on page four thereof:

IV–A.

That at the time of the filing of this bill of complaint the defendant, the Beet Growers Sugar Company, is possessed of the following-described personal property, which is referred to in and is covered by the said deed of trust aforesaid, viz.:

One steel traveling crane for distributing beets, now located on the premises hereinbefore described;

One miscellaneous lot of laboratory and electrical supplies, bolts, nuts, washers, screws, rivets, cotter keys, packing, storeroom supplies; pipe and pipe fittings; tools; oils and greases; automobile and truck supplies and parts; also located on the premises hereinbefore described; [37]

Four typewriter desks;
Four oak typewriter desks;
Two Underwood typewriters;
One L. C. Smith "
One Royal "
Four oak roll-top desks;
Three oak Cutler desks;
Three oak flat top desks;
Two oak standing desks;
Two small oak tables;
Eight oak swivel chairs;
Six oak arm chairs;
Five straight back chairs;
Six oak arm chairs;
One small swivel stool;
One stationary stool;
Two safes;
Three adding machines;
One check protector;
Two electric fans;
Four section filing cabinets;
One Hotchkiss punch #1;
" " " #2;
One cupboard;
One index file;
One steel cabinet;

One Tagliabue registering thermometer;
One surveying outfit, transit, tripod, rods, chains, etc.;
Eight wire paper baskets;
Five brass cuspidors;
One nickel cuspidor;
One hall tree;
Twelve wire trays;

Also the following tools and implements:

Six Duplex Trucks;
One Quad Truck;
Six Troy tailers;
Three Cultipackers;
Four dump wagons;
One Ford coupe;
42 Small tare scales;
44 beet drills and six sprayers, all located on the premises hereinbefore described;
Four beet wagons now in the possession of E. A. Casper, Frank Goody, K. Olmura, and H. Gross respectively in Jefferson County;
Two beet drills in Bannock County, Idaho;
One Cultipacker in the field in Jefferson County;
One Featherstone loader, located at Sugar City, in Madison County, Idaho;
One Featherstone loader situated at Plano, in Fremont County, Idaho;
One Featherstone loader at Ione, Bonneville County;
One Featherstone loader at Pocatello, Bannock County;
One John Deere loader at Newdale, Fremont County;

One John Deere loader located at Bern, Madison Co. [38]

Also 35 wagon scales located at various points in Jefferson, Madison, Fremont, Bingham and Bannock Countys, in the State of Idaho:

Also the following beet dumps, viz.:

One Highline dump at Ball Ranch, Jefferson County;

One Highline dump at Lewisville, Jefferson County;

One Highline dump at Lufkin, Jefferson County;

One Highline dump at Thornton, Madison County;

One Highline dump at Wilford, Fremont County;

One Highline dump at Winder, Madison County.

That the scales and beet dumps hereinbefore mentioned are situated on land held and owned by the said defendant in fee or upon lands held by it under lease at widely separated though convenient points in the farming districts tributary to said sugar factory for the weighing and storing of beets, and were installed and constructed by the said defendant at large expense; that the remainder of said personal property was also acquired by the said defendant at large expense solely for use in connection with and for the operation of the said sugar factory; that the said plant requires as a part thereof its facilities for handling raw materials from which its finished products, to wit: sugar and molasses are manufactured, including the means for preparing the ground, planting, cultivating and harvesting the crops thereon, and the means of

loading and transporting such raw materials to its factory; its chemicals and personal property for testing and facilities for storing said raw materials and its factory for manufacturing the same, all of said property, both real and personal, constitute essential and component parts of a single working plant, unit or system, in which each part is necessary to give value to the others, a dismemberment of [39] which would greatly impair the usefulness and value of the component parts thereof, and if the said real and personal property is sold separately or otherwise than as a unit the value thereof and subsequently the security for the payment of the bonds herein mentioned will be greatly depreciated, and the plaintiff further alleges on information and belief that if the said real or personal property is sold otherwise than as an entirety and without right of redemption it will be impossible to find bidders for the same at foreclosure sale under decree of this court:

And also amends its bill of complaint herein by changing the first three lines on page eleven of said bill, being a part of paragraph 1st of the prayer of said bill to read as follows: "manner appertaining, and all other real and personal property, whether owned by the said defendant at the time said deed of trust was executed or subsequently included by it and covered by the lien of said indenture, may be sold under decree of this Honorable Court as an entirety and free and clear of any rights whatsoever of redemption in the defendant,

or any person claiming under or through it and that out of the moneys, etc.''

WM. STORY, JR.,
Solicitor for the Plaintiff, Residing at Salt Lake City, Utah.

[Endorsed]: U. S. District Court, District of Idaho. Filed Oct. 9, 1923. W. D. McReynolds, Clerk. [40]

[Title of Court and Cause.]

ANSWER.

Comes now the defendant, Beet Growers Sugar Company, and in answer to complaint of plaintiff heretofore filed in the above-entitled action, admits, denies and alleges:

I.

That as to the allegations contained in paragraph VII of said complaint, this defendant has no information or belief upon the subject matter of the said paragraph that is hereinafter denied sufficient to enable it to answer said paragraph, and placing its denial upon that ground does deny that in consequence of the failure of the defendants to pay the taxes as set forth in said paragraph of said complaint that at the request of the owners of legal holders of more than twenty-five per cent of the bonds secured by the said indenture now outstanding notified the said defendant of its default in respect to the performance of its said covenants and or of its, plaintiff's election to declare

said bonds secured by said indenture, together with accrued interest [41] thereon, due and payable.

II.

That the defendant denies that a reasonable fee for legal services rendered and to be rendered by the attorneys for plaintiff as described and set forth in paragraph VII of said complaint is the sum of Fifteen Thousand ($15,000.00) Dollars, and denies that a reasonable compensation to be allowed to plaintiff for its services as set forth in said complaint is the sum of Ten Thousand ($10,000.00) Dollars.

For further answer this defendant alleges:

I.

That all of the said bond issue is now outstanding; that with the exception of $29,200.00 of said bond issue which has been sold and delivered the said bond issue has been delivered to various creditors of this answering defendant corporation to secure its indebtedness to them and that none of the holders of said bonds have reduced the same by any appropriate legal action to actual ownership and that, therefore, outstanding bonds to the amount of $470,800 of said bond issue are held as security only; that the said bonds were issued to secure indebtedness of approximately $249,502.91 which, with interest at the present time, amounts to $——; that what part of the holders of the said bonds as security have sought for the relief prayed in the complaint of plaintiff is to this answering

defendant unknown; that a substantial number of said secured creditors [42] with approximately $—— of indebtedness secured by the issue to them of bonds have signified to this answering defendant that they have not desired to press foreclosure proceedings under the said bond issue; that said secured creditors in the amount of about $151,797.91 have been holding about $—— par value of bonds for security of their indebtedness and have agreed to accept bonds of the new issue as that issue is described and set forth in paragraph V–A of said complaint in lieu of the bonds now held by them under the said trust deed which is made the subject of said plaintiff's action to foreclose.

II.

That this defendant through its board of directors and officers has been attempting to secure a purchaser for the whole or part of the said $750,000.00 bond issue described in said paragraph V–A and it is part of its plan to retire the said bonds secured under the trust deed to the plaintiff herein and secure release from said plaintiff of the said mortgage running to plaintiff as trustee and by the sale of the said new issue of bonds to re-finance the property of this answering defendant; that to permit a foreclosure and decree in this action would render it impossible for the said bonds secured by the said mortgage described in said paragraph V–A of said complaint to be sold or disposed of, all to the great detriment and irreparable injury to this answering defendant and its stockholders and its unsecured creditors. [43]

III.

That this defendant has a large number of unsecured creditors, approximately $298,724.03 in amount, and if a foreclosure decree is permitted in this action the said unsecured creditors will be unable to secure any payment of the indebtedness owed by this defendant as all of the property of this answering defendant of any substantial value is included in the trust mortgage to the said plaintiff trust company; that the creditors secured by the bonds issued under the trust mortgage are not in equity entitled to better or different consideration than the unsecured creditors; that it would be highly inequitable and unjust to permit any procedure to be carried on and foreclosure had in this action by which the said unsecured creditors would be finally defeated of any opportunity to procure payment of the indebtedness owed to them by this answering defendant; that, therefore, this answering defendant demands that before any decree of foreclosure be entered in this case that the said plaintiff shall be put strictly upon its proof to prove the allegations of said complaint in so far as performance of conditions precedent to the foreclosure of the said trust mortgage has been had by said plaintiff.

This answering defendant further states that it is unnecessary at the present time to appoint a receiver for the property described in the said mortgage to the plaintiff who shall do more than act as custodian of the said property; that there is at this time no [44] necessity for operation of the

said property or the performance of any acts on or in connection therewith excepting only such acts as look to the safekeeping of said property as contradistinguished from active operation or improvement or repair thereof, and if after it has been established that conditions precedent to the institution of this foreclosure proceeding have been had and a receiver is appointed, this defendant prays that due consideration for the unsecured creditors and for the economic conservation and custody of said property that the Court shall appoint as Receiver of this answering defendant's property some citizen of the State of Idaho who shall agree to accept the custody of said property without large fees or charges.

WHEREFORE, This answering defendant prays:

1. That the complaint herein be dismissed and that plaintiff go hence without judgment; that defendant have and recover its costs in this behalf expended.

2. That such decree be had in this case as will properly conserve and protect the interests of this answering defendant and its unsecured creditors.

BEET GROWERS SUGAR COMPANY,
By O. W. GEBBEY,
Vice-president.

HAWLEY & HAWLEY,
Residence: Boise, Idaho,
Solicitors for Defendant.

[Endorsed]: U. S. District Court, District of Idaho. Filed Oct. 25, 1922. W. D. McReynolds, Clerk. [45]

"Order Appointing Receiver in Usual Form." [46—47]

[Title of Court and Cause.]

ANSWER OF BEET GROWERS SUGAR COMPANY TO AMENDMENT TO BILL OF COMPLAINT.

Now comes the Beet Growers Sugar Company and makes the following answer to the amendment to the bill of complaint heretofore filed herein by the plaintiff:

1. Admits that the scales and beet dumps therein mentioned were installed and constructed by defendant at a considerable expense, but denies that they were installed at a large expense when compared with the aggregate cost of the property of this defendant described in the original bill of complaint and in the trust deed therein mentioned; admits that the personal property referred to in said amendment to the bill of complaint was acquired by the defendants solely for use in connection with and for the operation of its sugar factory, but denies that the same was acquired at a large expense when compared with the total cost of the property of [48] this defendant covered by the trust deed described in the bill of complaint; and admits that all of the property mentioned in said amendment at present constitute component parts of a single

working plant and that each part necessarily gives value to the others, but denies that a dismemberment of the system referred to in said amendment will greatly or at all impair the usefulness or value of the component parts thereof; and denies that if the said real and personal property is sold separately or otherwise than as a unit, the value thereof and subsequently the security for the payment of the bonds mentioned in said amendment and the original bill of complaint, will be greatly depreciated; and denies that if said real or personal property is sold otherwise than an entirety or is sold otherwise than without right of redemption, it will be impossible to find bidders for the same at foreclosure sale under decree of this Court, and alleges that any portion of the personal property of this defendant, even though sold separate and apart from the real property of this defendant, could be easily replaced.

Further answering the said amendment, this defendant alleges that at the time the trust deed was made and entered into, to which the plaintiff became a party, and at the time the bonds secured by said trust deed were sold, hypothecated or negotiated, it was expressly understood and agreed by and between all of the parties to said trust deed, including the plaintiff, this defendant, and the bondholders, whether holding said bonds as purchasers or merely as security, that in the event of a foreclosure and sale of the property of this defendant under foreclosure, the same should be sold

subject to the laws of the State of Idaho giving and providing a right of redemption from such sale.

WHEREFORE, this defendant prays that the relief sought by the plaintiffs under its amendment to bill of complaint, to wit, the sale of the property of this defendant without the right of redemption, be denied, and that in case of judgment of foreclosure issued and entered herein and a sale of the property of this defendant [49] be ordered, that such decree and order provide for a right of redemption pursuant to the laws of the State of Idaho in such case made and provided.

H. H. HENDERSON,
MARSHALL, MACMILLAN & CROW,
Attorneys for Defendant, Beet Growers Sugar Company.

[Duly verified.]

[Endorsed]: U. S. District Court, District of Idaho. Filed Oct. 18, 1922. W. D. McReynolds, Clerk. [49½]

[Title of Court and Cause.]

SUPPLEMENTAL BILL OF COMPLAINT.

To Hon. FRANK S. DIETRICH, Judge of the Above-entitled Court:

Your petitioner, the plaintiff herein, respectfully shows:

I.

That on, to wit, the 1st day of July, 1922, it exhibited its original bill of complaint in this court

against the defendants, Beet Growers Sugar Company and Ft. Dearborn Trust and Savings Bank, alleging herein that on, to wit, the 1st day of October, 1919, the said defendant, Beet Growers Sugar Company, by and pursuant to due and proper corporate action in that behalf, issued its negotiable first mortgage bonds bearing the last mentioned date and payable to bearer ten years after date, with interest thereon at the rate of seven per cent per annum, payable semi-annually, in accordance with interest coupons thereto attached and, at or about the time of the issuance of said bonds, secured the payment thereof by executing and delivering to your petitioner as trustee a mortgage or deed of trust, whereby *inter alia* it conveyed to your petitioner, as trustee, the property [50] particularly described in said deed of trust and in the original bill of complaint herein. That thereafter the said Beet Growers Sugar Company executed its second mortgage bonds in the aggregate principal amount of $750,000, and deposited the same with the said Ft. Dearborn Trust and Savings Bank, as trustee, for certification and delivery if and when the first mortgage bonds, secured by the deed of trust in favor of your petitioner as aforesaid, should be cancelled; and that on or about the said last mentioned date, the defendant, Beet Growers Sugar Company, also executed and delivered to the said Ft. Dearborn Trust and Savings Bank, as trustee, a second mortgage or deed of trust upon the property described in the complaint herein as security for the payment of its said second mort-

gage bonds; that the said Beet Growers Sugar Company having made default in the performance of certain covenants in the deed of trust executed by the said Beet Growers Sugar Company in favor of your petitioner as trustee, your petitioner, at the request of the holders of more than twenty-five per cent in principal amount of the bonds secured thereby, had declared all of said first mortgage bonds, together with all accrued interest thereon, to be immediately due and payable, and praying the foreclosure of the said deed of trust in its favor for the purpose of paying the said bonds and accrued interest thereon.

II.

That because of the desire on its part not to interfere with certain negotiations which the said Beet Growers Sugar Company then had pending for the sale of its said second mortgage bonds, by giving publicity to the filing of its said original bill of complaint, your petitioner did not file a notice of *lis pendens* in Jefferson County, Idaho, the county in which the property affected by this suit is situated, and that thereafter on, to wit, the 20th day of October, 1922, the above-named defendant, [51] Idaho Farm Loan Company, which is a corporation organized and existing under the laws of the State of Idaho, and is a citizen and resident of said state, obtained a judgment in the District Court of the State of Idaho, in and for Jefferson County, against the said defendant, Beet Growers Sugar Company, in the sum of $137.65, transcript whereof was filed for record in the office of the County Re-

corder of said Jefferson County on the 25th day of October, 1922;

And on, to wit, the 24th day of October, 1922, the above-named defendant, Thomas George, who is a citizen and resident of the State of Idaho, obtained two certain judgments in the District Court of the State of Idaho, in and for Jefferson County, against the defendant, Beet Growers Sugar Company, in the sums of $224.05 and $1072.45 respectively, transcripts whereof were recorded in the office of the county recorder of said Jefferson County on the 25th day of October, 1922;

And on, to wit, the 26th day of October, 1922, the above-named defendant, The First National Bank of Logan, Utah, which is a corporation organized and existing under the laws of the United States relating to national banks, and has its principal office and place of business in the city of Logan, county of Cache, State of Utah, and for all purposes connected with this suit is regarded in law as a citizen and resident of said last mentioned state, also obtained a judgment in the District Court of the state of Idaho, in and for the county of Jefferson, against the defendant, Beet Growers Sugar Company, in the sum of $1762.74, transcript whereof was filed for record in the office of the County Recorder of said Jefferson County on to wit, the 27th day of October, 1922.

III.

Your petitioner further shows that the filing for record of the transcripts of the judgments hereinbefore mentioned has [52] made the said judg-

ments liens upon the real estates described in the original bill of complaint herein, subsequent and subservient to the deed of trust whereby the said realty was conveyed to your petitioner as trustee, as security for the payment of said first mortgage bonds of the defendant, Beet Growers Sugar Company; and that in order to foreclose the said deed of trust, as against said subsequent incumbrancers, it is necessary that the said defendants, Idaho Farm Loan Company, Thomas George and The First National Bank of Logan, Utah, be joined as parties defendant in this suit and be required to answer the original bill of complaint herein and this supplemental bill of complaint within such time as may be allowed them so to do, but not under oath, an oath being hereby expressly waived.

IN CONSIDERATION WHEREOF, your petitioner prays that the said Idaho Farm Loan Company, Thomas George, and The First National Bank of Logan, Utah, be made parties defendant herein, and that subpoena may issue herein and be served upon the said defendants, Idaho Farm Loan Company and Thomas George; and that inasmuch as the said The First National Bank of Logan, Utah, is not a resident of and cannot be found within the District of Idaho, a warning order may be made and entered in this suit and served upon the said defendant Bank by the United States Marshall for the District of Utah or other qualified person requiring it to appear and defend this supplemental bill within a time to be fixed by this court, upon penalty of having a decree entered

pro confesso against it in accordance with the prayer of the said original bill and this supplemental bill of complaint; and for general relief and its costs in this behalf paid, laid out and expended.

And as in duty bound, your petitioner will ever pray, etc.

WILLIAM STORY, JR.,
Attorney for Complainant.

[Duly verified.]

[Endorsed]: U. S. District Court, District of Idaho. Filed Feb. 21, 1923. W. D. McReynolds, Clerk. [53]

[Title of Court and Cause.]

COMPLAINT IN INTERVENTION.

Comes now E. D. Hashimoto, and by leave of Court first had and obtained, files this his complaint in intervention, and his answer to the bill of complaint herein, and respectfully shows and states to the Court:

1. Your intervenor alleges that he has an interest in the subject matter of this suit and in the lands and premises, the matter in controversy herein; and is and was, at the time of the transactions complained of herein, a preferred stockholder of the Beet Growers Sugar Company, holding in his own right sixteen shares of the preferred stock of said company, and as such preferred stockholder he files this complaint in intervention for and on behalf

of himself and all other preferred stockholders similarly situated.

2. Your intervener alleges that the Beet Growers Sugar Company, defendant herein, is a corporation created and existing [54] under and by virtue of the laws of the State of Idaho, and that it is a citizen and resident of said state, having its principal place of business in the city of Rigby, in the County of Jefferson, State of Idaho.

3. Your intervener alleges that in and by the articles of incorporation of said company the limit of the capital stock thereof is $3,000,000.00, divided into two classes, to wit, preferred stock and common stock; of which there were and are 200,000 shares of preferred stock of the par value of $10.00 per share, and 400,000 shares of common stock of the par value of $2.50 per share.

That by said articles of incorporation it was and is expressly provided that the preferred stockholders should be entitled to receive, from the surplus or net proceeds of the corporation, a yearly cumulative dividend of seven per cent, payable before any dividend should be paid on the common stock; and that on dissolution or liquidation of the corporation the holders of preferred stock should be entitled to receive the full par value of their stock and all unpaid dividends accrued thereon, before any payment was made on the common stock, and that only the property remaining should be distributed among the holders of the common stock. That by said articles it was and is expressly provided that the preferred stock should not be entitled to vote at any stockholders' meeting of the company.

4. That there is issued and outstanding of the preferred stock of said company a total of 120,000 shares, and that the same represents an investment in cash made by the preferred stockholders of $1,200,000.00. That the total value of the assets of said company, as your intervener is advised and verily believes, does not exceed the sum of $1,200,000.00, and that the debts of said company are approximately $600,000.00. That there is no equity or value in said property, after the payment of [55] debts, for division among the common stockholders—any equity remaining after the debts are paid being less than sufficient to pay and satisfy the preference of the preferred stockholders.

5. That on the 1st day of July, 1922, the complainant in this action exhibited and filed in this court its bill of complaint herein, and that thereafter such proceedings were had herein that, upon the application of the complainant in said action, a receiver was appointed of all the property covered by the trust deed herein sought to be foreclosed, and the plant and property of said company has been taken into the possession of, and is now held by, the said receiver.

6. That in view of the situation and the conflicting rights of the different groups or classes of stockholders, certain of the preferred stockholders (including your intervener) owning preferred stock in said company entered into a preferred stockholders' association under the name of the "Association of Preferred Stockholders of the Beet Growers Sugar Company," with subcommittees at Salt Lake, Logan

and Ogden, Utah, and Idaho Falls, Montpelier and Rigby, Idaho, with an executive committee consisting of Fred Gustafson, Chairman, Idaho Falls, Idaho; R. H. Morgan, secretary, Willard, Utah; E. D. Hashimoto, treasurer, Salt Lake City, Utah; A. Van Cott, Salt Lake City; Geo. E. Hill, Rigby, Idaho; E. A. Austin, Montpelier, Idaho; T. S. Karren, Lewiston, Utah, and A. W. Lewis, Rigby, Idaho. That the said executive committee was constituted, by the agreement of the said preferred stockholders, a committee in the interest of the preferred stockholders who might deposit their stock as thereafter designated, with full power to delegate their authority to officers selected, and to direct legal proceedings, and to appoint one or more of their officers to appear or intervene in any legal proceedings in the interest of said preferred stockholders. That the said executive committee has authorized its [56] officers, R. H. Morgan and A. Van Cott, to cause your intervener, through its solicitors, to file this complaint in intervention; and your intervener is duly authorized to represent, as intervener, such of the preferred shareholders who may deposit their stock under the agreement of said association.

7. That neither this complaint in intervention nor the suit in which the same is filed is collusive to confer upon the United States Court jurisdiction of a cause of which it is not otherwise cognizant. That since the plant and property referred to in the complaint herein (being the principal assets of said concern) have been taken in the hands of a

Receiver, the Board of Directors has ceased to function; and this intervener is advised that it has no power or authority to determine the rights and priority of the preferred stockholders, or to reconcile or determine the rights of the conflicting groups of stockholders. That your intervener has applied to the receiver herein, but the receiver takes the position that it is not his duty to attempt to determine the conflicting rights of the respective groups of stockholders, and refuses to act in the premises, and this intervener is without remedy save by direct suit or by intervention herein.

8. Your intervenor further shows to the Court that by reason of the conflicting interests, and the right of the preferred stockholders herein to be entitled to any equity in the corporate property remaining after payment of the debts of said concern (a Receiver having been appointed), it is necessary for the said preferred stockholders to intervene herein—to the end that their interests in said property may be made preferred and their rights herein fully protected.

9. Your intervenor avers and respectfully suggests that, since the preferred stockholders have a priority over common [57] shareholders, not only in the payment of dividends, but also in the distribution of the assets remaining, the said preferred stockholders have the right and should be permitted and allowed, by decree, to deposit in partial payment of any bid which they may make at any sale ordered their shares of preferred stock, provided that they pay into the registry of this court a sum upon their

bid in cash sufficient to satisfy all the costs and expenses of this suit and sale, all Receiver's debts, all the mortgage debts (if any there be), and all debts and claims which have been filed, either in the foreclosure proceeding or in any general receivership.

10. Your intervenor is advised and verily believes that a reorganization through said preferred stockholders can be had, by which the obligations of said concern will be paid off and all matters fully adjusted. That such reorganization can only be effected through the Association of Preferred Stockholders, herein set forth, and by and through the recognition of their rights herein.

11. Your intervenor further alleges that by reason of the taking over of the property of said corporation, and the resulting paralysis in corporate action, there is no person authorized to attend to its corporate affairs, or to operate its plant, or to negotiate a sale of the property, or to borrow funds, or to contract for the corporation. That the good will of said plant is of great value, and the same will be dissipated and wholly lost unless contracts are made for the season of 1923 with beet growers in the adjacent territory.

12. That the unsecured claims against said corporation aggregate a large sum, to wit, approximately $220,000.00. That the said creditors threaten suits against the corporation and attachment, and unless the receivership herein is extended and all of the corporate affairs taken into the hands of a general [58] Receiver there will result a multiplicity of suits and the property of the corporation will be

wasted and dissipated, to the great and irreparable damage of your intervenor and other preferred stockholders similarly situated.

13. That many of the common creditors hold bonds, part of the series herein sought to be foreclosed, and the said creditors holding said bonds are proceeding—notwithstanding the foreclosure suit now pending in this court—to sell the bonds so held, and to acquire absolute title thereto, although the indebtedness for which the said bonds are held as collateral security is but a very small amount of the face of the bonds. That in some instances bonds to the extent of $40,000.00 are held by creditors for obligations of the corporation not exceeding $20,000.00; and in many instances the amount of bonds so held (being part of the bonds under the trust deed herein being foreclosed) are twice or three times the amount of the real indebtedness due from the corporation and secured by said bonds.

14. Your intervenor is advised and believes that the bondholders, the trustee, and all parties are anxious to have contracts made with the beet growers in adjacent territory so that the good will of the corporation can be preserved, and are willing and desirous, in the event that the Court shall so order, to have the expense thus incurred part of the expense of the administration of said estate, underlying the mortgage debt.

15. That the books and corporate records are being scattered, and unless at once preserved it will be impossible to make a complete accounting. That claims and chose in action to a large amount due

to the corporation will be lost and the evidence thereof mislaid and destroyed.

Answering the bill of complaint herein of the Columbia [59] Trust Company, this intervenor admits, denies and alleges, as follows:

1. This intervenor admits paragraphs I, II, III and IV of said complaint.

2. Answering paragraph V of said complaint, this intervenor admits that $500,000.00 of said bonds were duly authenticated by indorsement thereon of the certificate of the complainant, as Trustee, and admits that the same were delivered by the complainant to the defendant; and admits that a small portion, to wit, approximately $50,000.00 of said bonds were delivered to and are held by purchasers for value. As to the remainder of said bonds a portion thereof have wrongfully been taken by officers of the company who hold the same to protect and secure their alleged personal claims against the defendant, Beet Growers Sugar Company, which alleged claims represent but a small proportion of the face value of the said bonds so taken; and in taking the same the said officers wrongfully and improperly, and to the prejudice of the creditors of said company, preferred themselves as creditors, and have assumed to act in the taking as officers, when in fact incompetent so to act because of their personal interest. The balance of said bonds are pledged for sundry claims against the company, which claims are much smaller than the amount of bonds pledged; and the real mortgage indebtedness represented by the bonds, and for which said bonds

are pledged, is much smaller than the face of the bonds so held. This intervenor further alleges that the actual indebtedness of the corporation for which bonds are issued and held does not exceed the sum of $200,000.00.

3. This intervenor admits paragraphs V–a and VI of said complaint.

4. As to paragraph VII of said bill of complaint, this [60] intervenor admits that taxes and penalties have accrued against the mortgaged property in approximately the sum of $42,900.00, which are a lien upon the property, prior and superior to the deed of trust of the complainant. Admits that defendant company has failed to deposit with the plaintiff as Trustee policies of insurance, if it has any, upon the buildings and other improvements. As to whether twenty-five per cent of the bonds secured by said indenture and now outstanding have requested the plaintiff to notify the defendant company of its default in the aforesaid particulars in respect to the covenants in said mortgage, and as to the manner, if at all, the plaintiff has elected or pretends to elect to declare any part of the bonds due and payable, this intervenor has no knowledge nor any information sufficient to form a belief, and placing his denial upon that ground denies each and every allegation with respect thereto. This intervenor admits that the complainant is not advised as to the total amount of bonds outstanding, and alleges that the total mortgage indebtedness held as aforesaid and for which said property should be sold, and the amount due under said bond issue as

such mortgage indebtedness, does not exceed the sum of $200,000.00.

5. This intervenor admits all of the allegations contained in paragraph VIII of said bill of complaint, except as to the amount alleged as reasonable attorney's fees, and the amount alleged as trustee's fees; and as to such allegations this intervenor alleges that he has no knowledge nor any information sufficient to form a belief as to the amount of services rendered by the attorneys or by the trustee, or as to the amount which would compensate the said attorneys or the said trustee for their services in this behalf, and leaves said complainant to make such proof in the premises as it can make. And this intervenor further alleges that he has no knowledge nor any [61] information sufficient to form a belief as to whether the proper request has been made by the proper number of bondholders, or proper action has been taken in the premises, to entitle said Trustee to commence this action, and having no knowledge nor any information sufficient to form a belief with respect thereto, this intervenor leaves the complainant to make such proof in the premises as it can make.

WHEREFORE, this intervenor prays judgment upon his complaint in intervention and answer herein:

1. That in the event the plaintiff is entitled to foreclose its trust deed herein, and is entitled to the relief sought with respect thereto in this action, that the amount of the mortgage indebtedness be ascertained and adjudged by the Court; and that if neces-

sary, in the premises, the matter be referred to a master to take evidence as to the amount actually due from the corporation to the several bondholders holding bonds, and for which said bonds were issued, and that only the amount due from the said corporation to the several bondholders for which said bonds were given, together with interest, collector's fees, trustee's fees and costs, be adjudged and determined to be the mortgage indebtedness; and that the said bondholders be required to deposit their bonds with the registry of this court, and to make proof of the actual amount due from the corporation to the said bondholders for which said bonds are held, and that they be restrained and enjoined from taking any proceedings to magnify and increase the mortgage indebtedness by foreclosing the pledges of said bonds, and from claiming that there is due thereon any sum, save the actual corporate indebtedness for which said bonds are pledged.

2. That in the meantime and pending final decree herein, the receivership herein be extended, and the said Receiver clothed with the powers of a general and operating Receiver; and [62] that all creditors be required to present their claims, the same to be adjudged and determined in this action—to the end that the rights of all and every person interested in the property of said corporation be now and herein determined.

3. That the rights of this intervenor and all other preferred stockholders be determined, and that by the decree herein it be adjudged and determined

that the said preferred stockholders have a priority over the common stockholders and a first right, after the payment of all debts, claims and costs, to the assets remaining, for the purpose of paying all accrued dividends, and also to return to the said preferred stockholders the par value of their said stock.

4. That it be further by the decree of this Court adjudged and determined that this intervenor, and the other preferred stockholders have the right, and are permitted by the decree herein, to deposit in partial payment of any bid which they may make on any sale ordered their shares of preferred stock at their distributive value, provided that they pay into the registry of this court a sum upon their bid in cash sufficient to satisfy all the costs and expenses of this suit and sale, all Receiver's debts, the mortgage debt, and all debts and claims which have been filed herein.

5. And for such other and further relief as to the Court may seem just.

E. D. HASHIMOTO,
Intervenor.
DEY, HOPPAUGH & MARK,
Solicitors for Intervenor.

[Duly verified] [63]

"Order permitting Complaint in Intervention to be filed, granted." [64]

[Endorsed]: U. S. District Court, District of Idaho. Filed Dec. 7, 1922. W. D. McReynolds, Clerk.

"Petition of Receiver asking authority to lease property, filed." [65–70]

[Title of Court and Cause.]

ORDER TO TAKE COMPLAINT IN INTERVENTION PRO CONFESSO.

It appearing from the records and files herein that on the 22 day of November, 1922, an order was duly made and entered herein by the Court, authorizing E. D. Hahsimoto to file a complaint in intervention herein, and that thereafter, to wit, on the 7th day of December, 1922, the complaint in intervention of E. D. Hashimoto was filed herein, and it further appearing herein that a copy of said complaint in intervention was on the 6th day of December, 1922, served by mail upon Messrs. Hawley & Hawley, attorneys for defendant Beet Growers Sugar Company, at Boise, Idaho, and it further appearing that a copy of said complaint in intervention was served upon the solicitors for plaintiff Columbia Trust Company, on the 6th day of December, 1922, and on the solicitor for A. V. Scott, Receiver of Beet Growers Sugar Company on the 7th day of December, 1922, and that no motion, demurrer, plea or answer has been filed to said complaint in intervention, or appearance made in opposition thereto by any of the parties hereto, although such appearance [71] or pleading should have been filed on or before the 26th day of December, 1923, 15th day of January, 1923, and 27th day of December, 1922, respectively.

NOW, THEREFORE, on motion of A. L. Hoppaugh of Dey, Hoppaugh & Mark, solicitors for

said E. D. Hashimoto, complainant in intervention, it is ORDERED AND DECREED, that said complaint in intervention herein be taken *pro confesso* as to said defendants, Beet Growers Sugar Company and A. V. Scott, Receiver of the Beet Growers Sugar Company, and as to Columbia Trust Company, plaintiff herein.

Dated at Boise, Idaho, February 26, 1923.

[Seal] W. D. McREYNOLDS,
Clerk.

[Endorsed]: U. S. District Court, District of Idaho. Filed Feb. 27, 1923. W. D. McReynolds, Clerk. Pearl E. Zanger, Deputy. [72]

[Title of Court and Cause.]

PETITION OF INTERVENOR TO SELL ALL OF PROPERTY OF DEFENDANT COMPANY WITHOUT REDEMPTION.

The petition of E. D. Hashimoto, filed by leave of the Court first had and obtained, respectfully states and shows to the Court:

1.

That A. V. Scott was originally appointed Receiver herein upon the bill of complaint in this case filed by the Columbia Trust Company, for the purpose of foreclosing a trust deed, a copy of which is exhibited as a part of the bill of complaint, which trust deed included real and personal property, all comprising parts of a single working plant or utility, to wit: a sugar factory, in which each part is neces-

sary to give value to [73] the others, including the good will, and both the real and personal property, and where a dismemberment of the system would destroy or greatly impair the usefulness or value of its component parts:

2.

That in the order of this Court appointing said Receiver, the said A. V. Scott, as such Receiver, was ordered and directed to take possession of all the property and assets of the Beet Growers Sugar Company, real, personal and mixed, of whatsoever kind and nature, and wheresoever situated, covered by the said trust mortgage, and of the earnings, tolls, income, revenue, issues and profits thereof, and was authorized, empowered and instructed to take possession of, collect, control, preserve and protect the said property, including the books of account and other records relating to said defendant corporation.

3.

That the said Receiver duly qualified and has ever since acted as such Receiver.

4.

That thereafter your petitioner, by leave of this Court, and with the consent of all parties, filed his petition in intervention herein as a preferred stockholder of the Beet Growers Sugar Company, for and on behalf of himself, and all other preferred stockholders similarly situated, wherein he prayed *inter alia* in substance that the said Receiver be extended, and that all creditors be required to present their claims, the same to be adjudged and determined in said action, "to the end that the rights

of all and every person interested in the property of said corporation be entered and herein determined"; also that the preferred stockholders, after the payment of all debts and claims have the first right to the assets remaining and also that the preferred stockholders have the right and be permitted by the decree herein to deposit in partial [74] payment of any bid which they might make on any sale ordered their shares of preferred stock at their distributive value, and said complaint in intervention further prayed for general relief.

5.

That thereafter, and by consent of all the parties the Court herein made an order upon said petition in intervention, which order recited among other things that the said plaintiff was a preferred stockholder, and that he, and the other preferred stockholders, had a first and prior equity in all of the property of the corporation, after the payment of the corporate debts; that the corporation was not functioning and its corporate powers were not being exercised, and also that there was grave and imminent danger of the dissipation and loss of the corporate assets, unless the property was protected as a going concern; that the said order required all creditors to present and make proof of their claims under penalty of the same being disallowed, in the discretion of the Court; that the said order further directed that this Receiver in his discretion should enter into contracts with beet growers.

6.

That no plea or answer was filed to the complaint

of your petitioner, and thereafter this Court by its order duly given and made many months ago directed that a decree *pro confesso* be entered upon said complaint in intervention.

7.

Your petitioner further represents to the Court that as will appear upon an inspection of the said complaint in intervention that the purpose and effect thereof was to wind up the affairs of the corporation by sale of its property, and for an equitable distribution of its assets, first to its creditors secured and unsecured, and, second to its preferred stockholders. [75]

8.

Your petitioner further suggests to the Court that by the statutes of the State of Idaho on a dissolution of a corporation, voluntary or otherwise, the holders of preferred stock shall be entitled to have their shares redeemed at par before any distribution of any part of the assets of the corporation shall be made to the holders of common stock, and the provision of the statute is in substance and effect engrafted into the Articles of Incorporation of said company, which provides for the distribution of the assets among the holders of preferred stock before any of said assets shall be applicable to the holders of the common stock, and as appears from the complaint in intervention confessed herein there is no value remaining in the assets of said corporation over and above its debts, secured and unsecured, and the equity to which the said preferred stockholders are entitled.

9.

Your petitioner further shows that the said assets of the said Beet Growers Sugar Company consists of a sugar factory, situated at Rigby, in the State of Idaho; its beet dumps, trucks, personal property, the dumps being placed upon leased grounds at sites accessible to railroad facilities and to carry the sugar beets grown to the factory from the points where unloaded from the nearby farms; that the dumps so upon leased grounds are of great value, because of their location, and the personal property is of great value in connection with the factory operated as a going concern; that the whole comprises a single unit, all of which is essential to the factory as a whole and that the real and personal property all comprises parts of a single working plant or utility, in which each part is necessary to give value to the other, and that a dismemberment of the system would greatly destroy and greatly impair the usefulness and value of its component parts. [76]

10.

Your petitioner is advised and verily believes that should the property be dismembered or segregated and the real property be sold subject to redemption no purchaser could be found who would be willing to pay the taxes accrued upon the property, the administration expenses, and in addition any substantial sum upon the bonded indebtedness; but, on the other hand, your petitioner is advised and verily believes that should your Honor sell the whole of said plant as a single unit, including both

the real and personal property, without redemption, that a sufficient sum will be paid upon the property to not only pay the mortgage indebtedness, and administration expenses, but to leave a substantial sum in the hands of the Receiver to apply upon the claims of general creditors.

11.

Your petitioner further shows that the taxes accrued for the years 1920, 1921, 1922 and 1923, upon said property, aggregate approximately the sum of $74,00000; that your Receiver has no money with which to meet said payments and that a tax deed for the property, under the laws of the State of Idaho, will accrue on the first Monday of January, 1924, for the taxes for the year 1920.

12.

Your petitioner further shows that it is essential in order to maintain the value of said property that it be kept intact as a unit and as a going concern; that the value of said sugar factory and plant is largely dependent upon the good will and co-operation of the beet growers in the vicinity of said factory; that without having the good will, co-operation and continued loyalty of the beet growers the value of said factory and plant will be greatly depreciated and impaired to a great extent; that the loss for one season of the good will and co-operation of said [77] beet growers means a loss to said factory and beet growers in that vicinity; that should the said factory not be operated the coming season it will probably take several years before the confidence and co-operation of the beet growers

in the vicinity could be restored so that beets could be grown and furnished for the operation of the said factory hereafter; that thereby the value of said factory would become greatly impaired and would, unless the co-operation of said beet growers could hereafter be secured, become of junk value only; that in order to secure the operation of said factory for the following season it will become necessary to contract for beet seed, and begin to contract with the farmers and beet growers in January for the production of beets for the operation of said factory in the fall of 1924; that unless a sale is made without redemption such uncertainty will follow that the prospective purchasers will be deterred from bidding, not knowing after the purchase is made whether they will ultimately own the property or the condition of the property at the end of the redemption period, and also whether beet acreage will or can be secured for the operation of the factory after the termination of the period of redemption should the same not be redeemed.

13.

Your petitioner further says that the territory covered and to which the beet dumps of the Beet Growers Sugar Company extends is approximately sixty-five miles south of the factory; twenty-five miles north, and seven to eight miles east and west; that in the operation of said factory approximately one thousand farmers raise beets and have contracted from time to time with the Beet Growers Sugar Company for the sale of their beets and are largely dependent in the operation of their farms

upon the sale of such beets so raised; that during the sugar season as high as five hundred are employed at the factory; that the [78] town of Rigby, its prosperity or prostration is to a large extent dependent upon the said sugar factory; that if said factory were sold subject to redemption, in the opinion of your petitioner, a bid could not be obtained, or if one were successfully secured, no such bid could be obtained in excess of the mortgaged indebtedness; that if the property were sold without redemption as a single unit, your petitioner is informed and believes that a price would be bid upon said property in excess of the amount of the present bonded indebtedness, and administration expenses, and sufficient over and above the bonded indebtedness and administration expenses to pay a substantial sum to the common creditors.

14.

Your petitioner further suggests to the Court that unless a sale speedily occurs great and irreparable damage will follow for the reasons already stated; that under the pleadings in this case the property should be sold, its affairs wound up, and the moneys realized distributed among the persons entitled thereto.

15.

Your petitioner further shows that pursuant to the statutes of the State of Idaho on December 1st, 1922, the said Beet Growers Sugar Company forfeited its charter and ceased to have a corporate existence, and at that time the rights of your intervenor as a preferred stockholder, and all other

preferred stockholders similiarly situated accrued and thereby and thereupon became entitled to demand that the property of said concern be sold and its affairs wound up and its assets after the payment of its debts secured and unsecured applied to the payment of the par value of the stock of said preferred stockholders. [79]

WHEREFORE, your petitioner prays that because of the mergency as herein set forth that all of the assets, real and personal of said concern as a single unit, be sold without redemption; that out of the proceeds thereof this Court pay:

First. The costs and expenses of administration, including Receiver's and counsel fees, and any Receiver's certificates outstanding;

Second. All governmental charges;

Third. The amount of the mortgaged indebtedness when the same is fixed by the Court;

Fourth. If any surplus remains that the same be divided among the common creditors until the said common creditors are paid in full, and if there be any over-plus remaining after paying all the above stated sums that the said remainder be paid to the preferred stockholders to the extent of the par value of their stock, and if there still remains any sum after paying and satisfying all of the above items that such remainder be distributed among the common stockholders.

E. D. HASHIMOTO,
Petitioner.

DEY, HOPPAUGH & MARK,
Solicitors.

[Duly verified.]

[Endorsed]: U. S. District Court, District of Idaho. Filed Oct. 9, 1923. W. D. McReynolds, Clerk. [79½]

[Title of Court and Cause.]

ANSWER TO PETITION OF E. D. HASHIMOTO, INTERVENER.

Now comes the Beet Growers Sugar Company and answers the petition of E. D. Hashimoto, intervener herein, praying for a sale of the premises of this defendant, without redemption, as follows, to wit:

1. Answering paragraph 1 thereof, this defendant admits that the said A. V. Scott was originally appointed Receiver herein after the bill of complaint in foreclosure had been filed by the Columbia Trust Company; denies that the property of the defendant described in the trust deed under foreclosure is in any sense a public or *quasi*-public utility or anything more than a private enterprise, and denies that a dismemberment of the alleged system referred to in said paragraph 1 would destroy or greatly impair the usefulness or value of its component parts; and for further answer to said paragraph 1 this defendant refers to its additional answer hereinafter set out. [80]

2. Answering paragraphs 4, 5 and 6, of said petition, this defendant admits the filing of the complaint in intervention as therein mentioned and admits that no plea or answer was filed to said complaint, and that a decree *pro confesso* has been entered upon said complaint in intervention; but

in that regard this defendant alleges that said proceedings took place prior to the time when the present officers of the defendant corporation were elected and qualified and that since the election and qualification of the present officers of the defendant corporation, through such officers, the defendant has been endeavoring and is still making endeavors to procure the necessary funds with which to discharge its mortgage indebtedness and settle with its common creditors, as hereinafter in its additional answer more fully set forth; and further alleges that if the intervener and his associates are permitted to deposit in payment or partial payment of any bid which they might make on the sale of the property of this defendant, their shares of preferred stock at their distributive value, it will result in increasing largely the amount necessary to be paid for redemption of said property of this defendant from sale under foreclosure and will be inequitable to the common stockholders and to this defendant and its preferred stockholders who have not joined with said intervener; that the holders and owners of substantially seventy per cent of the par value of the preferred capital stock of this corporation issued and outstanding (and not including its preferred stock issued and outstanding as security for indebtedness) are opposed to the plan of the said intervener and his associates, and that if the said intervener and his associates are permitted to deposit their preferred stock in payment or partial payment of any bid which they might make on a sale of said property, and the

petition filed by said intervener for the sale of said property without redemption be granted, it will result in a complete and final liquidation of the defendant corporation in violation of the contract made and entered into between the stockholders [81] of this defendant corporation when they subscribed to its articles of incorporation and to its capital stock, and contrary to the will and wishes of a majority of the stockholders of this defendant corporation. Further answering said paragraph 6 this defendant admits that for a time it was not functioning and its corporate powers were not being exercised, but alleges that upon the election and qualification of its present officers it began to function as a corporate entity and its corporate powers have ever since said time been and are now being exercised for the benefit of its stockholders and creditors.

3. Answering paragraph 7 of said petition, this defendant admits that the complaint in intervention of the said intervener was filed with the intention and for the purpose of winding up the affairs of this defendant by a sale of its property, but alleges that the intervener is endeavoring by means of said complaint in intervention and his petition for the sale of the property of the defendant without redemption, to wind up the affairs of this defendant corporation, contrary to the express contract made and entered into between the stockholders under and by virtue of its articles of incorporation and contrary to and against the wishes of a great majority of the holders of the capital

stock of this corporation; and further alleges that although the said intervener and his associates have from time to time in writing and otherwise endeavored to secure consent of the stockholders of this corporation to the plan of said intervener and his associates, they have secured the consent of not more than the holders and owners of thirty-one (31) per cent in amount of the issued and outstanding preferred capital stock of this corporation, not including its capital stock issued to secure certain debts of this corporation; and this defendant further alleges that a great majority of the holders of the capital stock of this corporation are opposed to such attempted violation of the contract between the stockholders, as evidenced by its articles of incorporation, and to a sale of its [82] property without redemption and to the winding up of its affairs, as prayed for by said intervener.

4. Answering paragraph 8 of said petition, this defendant admits that the statutes of the State of Idaho therein referred to are in substance and effect grafted into the articles of incorporation of this company, but denies the right of a minority of the stockholders under the laws of Idaho to bring about and force, against the will and consent and wishes of a majority of the stockholders of this defendant, a liquidation and winding up of its affairs; and denies that there is no value remaining in the assets of this corporation over and above its debts secured and unsecured and the equity to which the preferred stockholders of this corporation are entitled.

5. Answering paragraph 9 of said petition, this defendant alleges that the dumps and scales of this defendant referred to in said paragraph have been appraised at the value of $42,000.00; and in this regard defendant alleges that the property of this defendant since the commencement of the foreclosure proceedings in this court has been appraised conservatively at the aggregate value of $1,358,200.00; admits that the personal property of this defendant is of great value in connection with the factory operated as a going concern, but allege that there is always a demand for personal property of the character of the personal property owned by this defendant; admits that the said enterprise comprises at the present time a single unit and that each part necessarily gives value to the other, but denies that a dismemberment of the system would greatly destroy or greatly impair the usefulness or value of its component parts, and allege that any portion of the personal property of this defendant even though sold separate and apart from the real property of this defendant, could be easily replaced.

6. Answering paragraph 10, this defendant denies that if the said property should be dismembered or segregated and the real property sold subject to redemption, no purchaser could be found [83] who would be willing to pay the taxes accrued upon the property, the administration expenses, and in addition a substantial sum upon the bonded indebtedness.

7. Answering paragraph 11 this defendant denies that the aggregate amount of the taxes accrued

against said property is of the sum of $74,000.00 or of any sum in excess of $67,000.00; and denies that a tax deed for said property under the laws of the State of Idaho will accrue on the first Monday of January, 1924, for the taxes for the year 1920; and in this regard further alleges that this defendant is now endeavoring to procure the necessary moneys to meet and pay all of said taxes, together with any penalties thereon.

8. Answering paragraph 12, this defendant denies that it is essential in order to maintain the value of said property, that it be kept intact as a unit or as a going concern; admits that the said sugar factory and plant is to a certain extent dependent upon the good will and co-operation of the beet growers in the vicinity of said factory; admits that without having the good will, co-operation and continued loyalty of the beet growers the value of said factory and plant will be to a certain extent depreciated, but to what extent the said value will be depreciated and impaired this defendant is at this time unable to express an opinion; denies that the loss for one season of the good will or co-operation of said beet growers necessarily means a loss to said factory or to the beet growers in that vicinity; denies that should the said factory not be operated the coming season it will probably take several years before the confidence or co-operation of the beet growers in the vicinity could be restored, so that beets could be grown or furnished for the operation of the said factory hereafter or thereafter; denies that thereby the value of said factory

would become greatly impaired; denies that unless a sale is made without redemption such uncertainty will follow that prospective purchasers will be deterred from bidding or that a sale of the factory without redemption would [84] result in any dubiety as to the ability or probability of the owner of said factory securing beets for the operation thereof after the termination of the period of redemption, should the same not be redeemed; and for further answer to the allegations of the said paragraph this defendant refers to its additional answer hereinafter set out.

9. Answering paragraph 13 this defendant denies that the farmers therein referred to are largely dependent in the operation of their farms upon beets raised for this defendant company's factory, but in this regard alleges that for many years prior to the erection of this defendant company's factory, said farmers did contract with and raise beets for other sugar companies, and that ever since the erection of this defendant company's factory said farmers have contracted with and raised sugar beets for sugar companies other than this defendant company, and that at *time* a portion of said farmers have raised beets for this defendant company and other sugar companies during the same season and are doing so during the present season; and for further answer to the allegations of said paragraph, this defendant refers to its additional answer hereinafter set out.

10. Answering paragraph 14, this defendant denies that unless a sale speedily occurs great or

irreparable damage will follow for the reasons stated in said petition or for any other reasons, and denies that under the pleadings in this case the property of this defendant should be sold without redemption or its affairs wound up.

11. Answering paragraph 15, this defendant admits that under the laws of Idaho on December 1, 1922, its charter was forfeited for failure to pay taxes, but alleges that its said charter was forfeited after the receiver of its property was appointed by this Court; that it was the duty of said receiver to pay said taxes and reinstate this defendant company but that the said receiver neglected so to do, and this defendant thereafter paid the said taxes under the [85] laws of the State of Idaho, its rights as a corporation were reinstated, ever since which said time it has been and is now in good standing as a corporation in the State of Idaho.

ADDITIONAL ANSWER.

This defendant makes the following further and additional answer to the said petition of intervener, to wit:

(A) This defendant admits that the value of the sugar factory and plant of the Beet Growers Sugar Company is to a certain extent dependent upon the good will and co-operation of the beet growers in the vicinity of said factory, and in that regard alleges that a large number of stockholders of this defendant corporation are farmers residing within the vicinity of said factory who have from time to time grown beets under contracts for this defendant corporation and that their interest consists not only

of an interest as a beet grower but also as a stockholder; that said persons became stockholders of said corporation for the purpose of organizing and having an interest in an independent sugar factory in order that they might be interested in said factory as growers of beets and as stockholders; that the majority of such persons are opposed to the sale of the property of this defendant corporation without redemption, but as stockholders of this defendant corporation desire in the event of the sale of said factory under foreclosure of the trust deed described in the pleadings on file herein, that they be given the benefit of the laws of the State of Idaho providing for redemption under foreclosure proceedings in order that they, together with other stockholders of said corporation, may have an opportunity with this defendant corporation of arranging and providing for the redemption of the property of this defendant corporation from any sale that might be made under foreclosure proceedings.

(B) This defendant further alleges that of its stockholders [86] there are 1,000 residing in and who are residents of the State of Idaho and who hold capital stock of said corporation of the par value of $455,590.00, and in addition thereto $600,000.00, par value of the preferred capital stock of said corporation which has been issued and is now being held as collateral security for the indebtedness of this defendant corporation; that the sale of said property of this corporation without redemption would result in a loss to the said persons

holding and owning said capital stock of this defendant corporation of almost, if not all, of their holdings in this defendant corporation, for the reason that the full value of the property of this defendant corporation could not be realized at any public sale of said property, whether with or without redemption, and that if the said property should be sold without redemption the said stockholders would have no opportunity whatsoever of protecting themselves against the loss of their holdings in the capital stock of this corporation and would not be protected except to the extent of any sum which might be realized over and above the amount of the secured indebtedness of this defendant; that in addition to such stockholders there are a large number of unsecured creditors of this corporation holding an indebtedness against this corporation of the aggregate value of $214,624.00; that in the opinion if this defendant a sale of the property of this corporation without redemption would not realize sufficient over and above the secured indebtedness of this corporation to meet the indebtedness held by such unsecured creditors; that for the reasons set forth in this paragraph, this defendant alleges a sale of its property without redemption would be detrimental and inequitable to said stockholders and said creditors.

(C) This defendant further alleges that it has 2,173 stockholders, of which number 72% are farmers; that the total amount of its preferred capital stock issued and outstanding which has been paid for in cash is $1,160,050.00, and in addition thereto

$600,000.00 par value of its preferred capital stock issued and [87] held as collateral security for an indebtedness of $300,000.00; that of the said $1,160,050.00, par value of preferred capital stock so as aforesaid issued and outstanding and paid for in cash, the alleged association of preferred stockholders, represented by the intervener, E. D. Hashimoto, holds $360,000.00 par value, or approximately 31% of the total amount of the preferred capital stock of this corporation issued and outstanding and paid for in cash; that there are 649 creditors of this defendant corporation holding claims aggregating $214,624.85, which claims are unsecured; that this defendant, through its officers, has been engaged in promoting a plan for the refinancing of this defendant corporation in order to enable it to liquidate the secured and unsecured indebtedness, for which purpose a large number of the preferred stockholders have been interviewed, including a number of the preferred stockholders who have become members of the alleged association of preferred stockholders, and from such interviews this defendant has ascertained and alleges that a majority of the holders of the preferred capital stock of this defendant are opposed to the sale of its property without redemption, and have signified their willingness to co-operate in a reorganization, which will result in the liquidation of its indebtedness, including the claims of secured and unsecured creditors, and in a saving of the investment of the stockholders of this defendant; this defendant further alleges that in the event a

sale of its property upon foreclosure shall be ordered by this court, subject to redemption, it will be able to consummate its plans and redeem the property from such sale within the period of redemption provided for under the laws of the State of Idaho, but that in case sale shall be ordered without redemption it will result in a great, if not total, loss to its preferred and common stockholders and its unsecured creditors.

(D) Defendant further alleges that it has been hampered in its plan of reorganization up to the present time by reason of the fact that most of the outstanding bonds of this defendant have been held [88] as security and it has therefore been unable to state and is now unable to state the exact amount of such secured indebtedness and will be unable to do so until this Court has ascertained and determined under the proceedings heretofore had and now pending, the exact amount of such secured indebtedness.

(E) This defendant further alleges that the said intervenor and his associates in a written explanation of the plan of its reorganization dated November 24, 1922, and addressed to the preferred stockholders of the Beet Growers Sugar Company, after referring to the indebtedness of said corporation and to the fact that the preferred stockholders had invested in said corporation $1,160,000.00, referring to the property of this defendant, stated:

> "There is even now at junk values, a substantial equity in the property, above all debts secured and unsecured"

and further stated in said writing, referring to the value of this defendant's sugar factory, as follows:

> "An expert appraisement on present existing values, fixes the value at $1,333,200. This is based on the plant stripped to actual values. The debts all told cannot exceed, we believe, $600,000.00. And yet, with a difference of $700,000.00 between the debts and the real value of the plant (on this kind of an appraisement) the preferred stock today has no market value."

That the portion above underlined was by the intervener and his associates in said writing caused to be printed in bold, black type; that in said writing the intervener and his associates further stated:

> "The common stockholders have some equity in the corporation, and to be absolutely fair this interest should be recognized."

That in the said writing which was sent to the preferred stockholders in an endeavor to secure their consent to the plan of the intervener and his associates, it was further stated that the costs of foreclosure, clerk's fees, U. S. Marshal's commissions on sale, receiver's charges, trustee's and attorneys' fees, printing, state tax on new corporation, a new bond issue, interest on the unsecured [89] indebtedness, and penalties on taxes, would amount to at least $250,000.00.

WHEREFORE this defendant prays that the order sought by the intervener in his petition be denied and that the said petition be dismissed.

MARSHALL, MacMILLAN & CROW,
H. H. HENDERSON,
Attorneys for Beet Growers Sugar Company.

[Duly verified.]

[Endorsed]: U. S. District Court, District of Idaho. Filed Oct. 17, 1923. W. D. McReynolds, Clerk. [90]

[Title of Court and Cause.]

PETITION OF INTERVENER TO EXTEND POWERS OF RECEIVER.

To the Honorable FRANK S. DIETRICH, Judge of the United States District Court in and for the District of Idaho:

Your petitioner, E. D. Hashimoto, intervener herein, in his own behalf and in behalf of the Association of Preferred Stockholders of Beet Growers Sugar Company respectfully petitions and shows this Honorable Court:

1. That A. V. Scott is the duly appointed, qualified and acting Receiver of all of the property and assets of Beet Growers Sugar Company and as such receiver is in possession of said property and assets.

2. That the general taxes levied and assessed against the property of the Beet Growers Sugar Company for the years 1920, 1921 and 1922 were not paid when the same became due and payable and pursuant to the laws of the State of Idaho all

of the real property of said company, including the factory buildings and improvements, was on the first Monday of January, 1921, sold to the County of Jefferson, State of Idaho. [91]

3. That no redemption of said property has been made from said tax sale and no payments have been made on account of taxes for said years, or either of them.

4. That on or about the first day of August, 1923, your petitioner was informed by the Treasurer of Jefferson County, Idaho, that the amount due at that time to the Treasurer of Jefferson County on account of taxes and interest for said years 1920, 1921 and 1922 was the sum of $57,872.00.

5. That your petitioner is not informed as to the amount of general taxes due for the year 1923, but is advised that unless one-half of said taxes are paid on or before the fourth Monday in December, 1923, that said taxes for said year 1923 will become delinquent.

6. That all of the property so sold for taxes is in the possession of said A. V. Scott, Receiver of Beet Growers Sugar Company.

7. That by the terms of Section 3254, Idaho Compiled Statutes, 1919, it is provided as follows:

> "Redemption. The property described in any delinquency entry may be redeemed from tax sale by the owner thereof, or any party in interest, on or after the fourth Monday of January after, and within three years from the date thereof, or until tax deed is issued to the county by paying the amount of all delin-

quent taxes and penalties, as shown in such entry, together with the interest accrued thereon, to the tax collector, as prescribed in this chapter: Provided, That no person shall be permitted to redeem any property from sale for delinquent taxes of any year after a tax deed has issued thereon for delinquent taxes of any prior year. Provided further, That no person shall be permitted to redeem any property from sale for delinquent taxes of any year unless the said property has been redeemed from all sales for delinquent taxes of prior years."

That your petitioner is advised that said Section 3254 has not been amended but that Section 3256, Idaho Compiled Statutes, 1919, reading as follows:

"Tax Deed: Issuance. If the property is not redeemed within three years from the date of the delinquency entry, the tax collector or his successor in office must make to the county a deed to the property."

was amended by Chapter 45, Session Laws of Idaho, 1920, to read as follows:

"Tax Deed: Issuance. If the property is not redeemed [92] within *four* years from the date of the delinquency entry, the tax collector or his successor, in office must make to the county a deed to the property."

8. That your petitioner is advised that doubt exists as to whether Beet Growers Sugar Company or A. V. Scott, its receiver, will be entitled to re-

deem said property after the first Monday of January, 1924.

9. That Beet Growers Sugar Company is unable to pay or discharge any portion of said delinquent taxes and your petitioner believes it to be to the best interests of all concerned in the above-entitled proceeding, for the protection of the property of said company in the possession of said receiver, for this Court to authorize said A. V. Scott, Receiver, to borrow as soon as possible, sufficient money to redeem said property from said delinquent tax sale and thereby protect the title of said property for the benefit of all concerned. That said Receiver be authorized to issue his Receiver's certificate or certificates of indebtedness for any moneys so borrowed, said receiver's certificate or certificates to be a first and underlying lien upon all of the property of Beet Growers Sugar Company, ahead of and prior to the lien of the trust deed upon said property being foreclosed herein and ahead of and prior to the lien or claim of any bondholder claiming under said trust deed and ahead of and prior to the claims of any and all creditors of Beet Growers Sugar Company.

WHEREFORE, your petitioner prays that an order be made and entered herein authorizing said A. V. Scott, Receiver of Beet Growers Sugar Company, to borrow such sum or sums as may be necessary to redeem the property of Beet Growers Sugar Company from delinquent tax sales and to pay said taxes as soon as he can borrow said money; that said Receiver be authorized to issue

his negotiable receiver's certificates of indebtedness for money so borrowed, said receiver's certificates [93] by said order to be declared a first and underlying lien upon all of the property of Beet-growers Sugar Company, ahead of and prior to the lien of the Trust Deed to Columbia Trust Company which is being foreclosed herein and ahead of and prior to the claim or claims of any bondholder claiming under said Trust Deed, and ahead of and prior to the claims of any and all creditors of Beet Growers Sugar Company.

(Signed) E. D. HASHIMOTO.
By DEY, HOPPAUGH & MARK,
Attorneys for Petitioner.

Duly verified. [94]

[Endorsed]: Filed December 13, 1923. W. D. McReynolds, Clerk. By M. Franklin, Deputy. [95]

[Title of Court and Cause.]

ORDER OF COURT EXTENDING POWERS OF RECEIVER.

An order was heretofore made in this suit, bearing date the 25th day of October, A. D. 1922, and entered on the 28th day of October A. D. 1922, in which it was ordered, adjudged and decreed that A. V. Scott be appointed receiver of the property of the defendant, Beet Growers Sugar Company, covered by the mortgage made by the said Company which is sought to be foreclosed in the bill of

complaint herein, with the powers and instructions stated in the said order.

NOW, on the 30th day of December A. D. 1922, there comes before me, E. D. Hashimoto, intervenor herein, and representing by his bill of complaint in intervention that he is a preferred stockholder of the Beet Growers Sugar Company, and that he and the other preferred stockholders have a first and prior equity in all of the property of said corporation, after the payment of all corporate debts, and that by the appointment hitherto made, and through the acts of the officers following, the said corporation is not now functioning and its corporate powers are not being exercised;

And the said E. D. Hashimoto, intervenor for [96] himself and the other preferred stockholders, representing to the Court by his complaint in intervention herein, that a large portion of the plant and equipment are valuable due to the good will of the going concern, and that it is necessary to preserve the contracts for the growing of sugar beets to supply the factory of the Beet Growers Sugar Company, and there is grave and imminent danger of dissipation and loss of corporate assets unless the plant is protected as a going concern, and that the receiver be given full power to enter into contracts with beet growers for the season of 1923, and to take into his possession the books, documents, papers and records of the said Beet Growers Sugar Company, and to require all the creditors to appear herein and make proof of their claims, and that all

rights in and to the property of said corporation should be adjudicated to this action, and notice of the intention of said E. D. Hashimoto to supply to this Court for an order as prayed for in said complaint in intervention having been served upon all parties to this action and at the time set for the hearing of said application, no objection having been made to the granting of said order;

AND THE COURT having read and considered the affidavit of Frank A. Johnson on file herein; and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the receivership of said A. V. Scott, be, and the same is hereby extended to cover all of the books, records, documents and papers of said corporation, and the said A. V. Scott be, and he is hereby authorized and directed to take into his care, custody and control all the books, records, documents and papers of every nature of said corporation, but said books, records, documents and papers shall be held by him readily accessible at all reasonable times to the officers of said company for their inspection upon reasonable demand, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said A. V. Scott be, and he is hereby authorized and directed to call for claims of creditors against said Beet Growers Sugar [97] Company and to publish in newspapers of general circulation in Jefferson County, Idaho and Salt Lake County, Utah, notice of creditors to present their claims against said Beet Growers Sugar Com-

pany to said A. V. Scott, said claims to be presented within sixty days after the first publication of said notice, under penalty of having the same disallowed in the discretion of the Court, and said receiver is authorized and directed to mail to each creditor of said company, as shown by the books of said company, to the addresses shown by said books a copy of said notice, said notices to be mailed as soon as possible after the first publication thereof and not later than twenty days before the final date for the presentation of said claims as specified in said notice; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said receiver be, and he is hereby authorized and permitted at his discretion to enter into beet contracts with beet growers in the territory adjacent to the plant of the defendant, Beet Growers Sugar Company, for the season of 1923, upon such terms as in the discretion of the receiver may seem proper, and to advance and furnish to said beet growers seed upon terms in said contracts stated, upon condition, however, that funds necessary to cover the cost and expense of securing such contracts and the furnishing of beet seed be advanced by the preferred stockholders of said company, *said company,* said funds so advanced to be part of the cost and expense of administration of said estate, and said A. V. Scott is hereby authorized to issue non-negotiable receiver's certificates for all sums so advanced, said receiver's certificates to bear interest at the rate of eight per cent per annum from date until paid,

and said receiver's certificates to be paid as part of the cost and expense of administration of said estate,

Said receiver before entering upon his additional duties shall take and subscribe to an oath to faithfully perform the duties of his office and shall execute an additional undertaking to the clerk of this court for the benefit of all whom [98] it may concern in the penal sum of $2500.00 additional, with one or more sureties, the same to be approved by this court, said undertaking to be to the effect that he will faithfully discharge the duties as receiver under the order of the Court.

Dated this 30th day of December, A. D. 1922.

By the Court.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed Dec. 30, 1922. W. D. McReynolds, Clerk. By Pearl E. Zanger, Deputy. [99]

[Title of Court and Cause.]

ORDER OF COURT RE CLAIMS DATED APRIL 17, 1923.

BE IT REMEMBERED that this cause comes on for hearing before the court on this 7th day of April, 1923, pursuant to previous setting of the cause for trial, Wm. Story, Jr., Esq., appearing as solicitor for the plaintiff; Messrs. H. R. MacMillan and Thomas Marioneaux appearing as solici-

tors for the defendant, Beetgrowers Sugar Company, and Messrs. Dey, Hoppaugh & Mark appearing by Frank A. Johnson, Esq., as solicitors for the intervener, E. D. Hashimoto; and it appearing to the court from the allegations of the petition in intervention, which have been taken as confessed by the entry of an order *pro confesso* herein, that a large part of the bonds which are secured by the deed of trust, the foreclosure of which constitutes the subject matter of this suit, are held by certain creditors of the defendant, Beetgrowers Sugar Company, in pledge as security for the payment of their claims against the said defendant, and not under claim of absolute ownership thereof, and it further appearing that the amount of the indebtedness due from the defendant Beetgrowers Sugar Company to such several [100] pledgees and the validity of such pledges should be determined prior to the entry of final decree herein,

IT IS ORDERED that R. W. Jones, Esq., of the city of Pocatello, State of Idaho, be and he is hereby appointed as an examiner of this court to take such testimony as may be offered by the respective parties to this cause and/or holders, whether as pledgees or owners, of the said bonds of the defendant, Beetgrowers Sugar Company, as may be now issued and outstanding, in relation to the ownership of such bonds or the validity of pledges under which the same are held, and also in relation to the amount and validity of the claims against said defendant corporation, which are secured by pledge of such bonds:

IT IS FURTHER ORDERED that this shall be construed as a warning order, requiring all the holders of said bonds, whether pledgees or owners thereof, to appear before the said examiner in this courtroom on the 25th day of May, 1923, then and there to introduce such testimony or other evidence in support of their claims to the bonds so held by them, and in cases of pledgees of said bonds, of the amount of their claims against the defendant corporation, as security for which the bonds are held in pledge, as they may care to offer; and that copies of this order be served upon each and all of the holders of said bonds whose address is known, by the United States Marshal for the respective districts in which the holders of the bonds reside, not less than thirty days prior to the date fixed for said hearing; and further, that the complainant herein be and it is hereby directed to advise all holders of said bonds hereof, in so far as the names and addresses of such holders are known to it;

IT IS FURTHER ORDERED that the said examiner shall have power to adjourn such hearing, from time to time, to such [101] dates and places within the district as may suit the convenience of the examiner and the parties in interest or their respective solicitors, and upon consent of all parties in interest may adjourn the said hearing to such place or places without the district as may best suit the convenience of himself and the various parties in interest. Upon the completion of the taking of the testimony and other evidence in respect to such matters, the said examiner shall report the same

with all convenient speed to the court for its consideration; and all of the parties who have appeared in this suit having consented thereto, IT IS HEREBY ORDERED that further proceedings in this cause may be had either at the City of Pocatello in the Eastern Division, or at the City of Boise in the Southern Division of this District, upon such notice as is now prescribed by the rules or as hereafter may be fixed by the Court;

AND IT IS FURTHER ORDERED that upon the failure of any holder of said bonds to offer evidence in support of his claim thereto as hereinbefore required, such defaulting bondholder shall be debarred from participation in the proceeds of any sale of the property of the defendant, Beetgrowers Sugar Company, which may be made in foreclosure of the said deed of trust under the final decree of this court, until he shall have proved his right and the extent to which he may be entitled to participate therein to the satisfaction of the court.

Dated this 17th day of April, 1923.

(Signed) FRANK S. DIETRICH,
Judge.

Approved:

THOMAS MARIONEAUX,
MARSHALL, MacMILLAN & CROW,
Attorneys for Defendant, Beetgrowers Sugar Company.

DEY, HOPPAUGH & MARK,
Attorneys for Intervenor, E. D. Hashimoto.

[Endorsed]: Filed April 17, 1923. W. D. McReynolds, Clerk. [102]

"Order issued authorizing Receiver to solicit bids for lease of property." [103—104]

[Title of Court and Cause.]

MEMORANDUM DECISION.

December 28th, 1923.

WM. STOREY, Jr., for Plaintiff.

MARSHALL, McMILLAN & CROW and H. H. HENDERSON, for Defendant Sugar Company.

JAS. D. PARDEE, for Intervenor Deardorff.

DEY, HOPPAUGH & MARK and M. E. WILSON, for Intervenor Hashimoto.

C. A. BANDEL, Special Counsel for Claimant Cabbey.

W. STOREY, Jr., Special Counsel for Claimant Lewis.

C. W. MORRISON, Special Counsel for Thomas George.

O. E. McCUTCHEON, for Receiver.

DIETRICH, District Judge:

In view of the conclusion I have reached touching the method of disposing of the property of the Beet Sugar Company and desirability of expediting the sale, I shall defer decision upon some controverted questions and shall state the conclusions reached upon others without extended discussion.

STATUS OF BEET GROWERS SUGAR COMPANY.

1. Stock.

The company has an authorized capital stock of $5,000,000, namely 400,000 shares of common stock of the par value of $2.50 per share, and 400,000 shares of preferred stock of the par value of $10,00 per share. [105]

The amount of stock issued and outstanding does not clearly appear from the record, but it would seem that at least one-half the common stock and between $1,160,050 and $1,200,000 of the preferred stock is outstanding. Only the holders of the common stock have the right to vote, and upon the other hand the preferred stock has priority of right of dividends upon the seven per cent. The stockholders are very numerous.

2. Trust Deed and Bonds:

The plaintiff is the trustee named in a trust deed executed by the Beet Sugar Company, purporting to cover all of its property, real, personal and mixed, as security for an authorized issue of bonds in the amount of $500,000, bearing interest at the rate of 7% per annum. Some of these bonds were sold outright and are held by the purchasers. The majority of them were delivered as collateral.

It is not questioned that the bonds purporting to have been sold outright are valid, subsisting obligations of the company secured by the trust deed.

It is further conceded upon all hands that many of the bonds held as collateral were duly and regularly delivered as such and are valid obligations of the company to the extent of the indebtedness they secure.

As to other of such collateral bonds the validity of the delivery is questioned, but without discussion I am inclined to hold that all such deliveries were authorized and are valid, with the possible exception of a block of $40,000, $22,500 of which came into the possession of one Gabbey, and are held by him or his assigns and $17,500 of which were turned over to one Goodwin and are held by his assignee Lewis. As to the status of these bonds—$40,000—decision is deferred.

3. Indebtedness:

A. Claims secured by trust deed:

Upon account of the bonds so issued and sold outright, and claims secured by bonds held to have been duly delivered as collateral, it is found that the company is indebted in the aggregate principal sum of $264,174, together with accrued and accruing interest, such interest computed up to the [106] 31st day of October, 1923, aggregating $43,784.61.

Because of certain distinctive conditions, and pursuant to stipulation of counsel, I shall allow to the claimant Ogden Iron Works $400 as attorneys' fees, and to Edward E. Jenkins, Receiver, $2,500 on the same account, which several amounts are to be added to these claims. No attorney fees will be allowed to other claimants.

In addition to these amounts there are several thousand dollars owing to Gabbey, estimated at $14,342, on October 31st, 1923, and several thousand dollars owing to Lewis estimated at $6,825 as of the same date, as security for the payment of which Gabbey and Lewis claim to hold as collateral the $22,500 and the $17,500 of bonds above referred to. For reasons disclosed in the discussion of these two claims, as per memorandum hereto attached, it is impossible at this time to state the precise amount due to either of these claimants, portions of their claims being dependent upon compliance with certain conditions precedent.

B. Judgments:

(a) Judgment in favor of Idaho Farm Loan Company, a corporation, $137.65, dated October 20, 1922.

(b) Judgment in favor of Thomas George, $224.05 and $1,072.45 both dated October 24, 1922. (The claim of an attachment lien by this creditor is denied.)

(c) Judgment in favor of First National Bank of Logan, Utah, $1,762.74 dated October 26, 1922.

These judgments will be recognized as liens upon the real property of the Beetgrowers Sugar Company, subject to the lien of the trust deed.

C. Unsecured Claims:

I find no evidence in the record disclosing the exact total of the unsecured claims, but in the arguments it was repeatedly stated that they are very numerous and aggregate a large sum. In the complaint in intervention, filed by the intervenor

Hashimoto, it is alleged they approximate $200,000 and defendant alleges specifically $214,624.85. Presumably interest is to be added. Perhaps for the purposes of the present decision it may be assumed that such claims aggregate at least $200,000. [107]

D. Taxes:

I am not advised as to the precise aggregate of taxes and penalties for delinquency, but from representations made in the pleadings and during the course of the trial, and more recently by petition for an order authorizing the receiver to borrow money to take care of the taxes, it may be safely assumed that they approximate $75,000.

E. Expenses of Receiver:

I am unable at this time to state with any degree of certainty the amount of the receiver's certificates outstanding for the unpaid accrued and accruing expenses of the receiver, for the payment of which there will be no receivership funds available.

F. Trustee's Compensation & Attorney Fees:

Because of the doubt as to whether or not it will be necessary to foreclose the trust deed by decree and foreclosure sale, I do not at this time fix the amount of compensation to be paid to the trustee and to its attorneys, but in any view the item will be substantial and will have to be taken into consideration in estimating the amount for which the property must be sold to take care of certain classes of claims.

MODE OF SALE OF SUGAR COMPANY'S PROPERTY.

The question of whether or not the property

should be sold without redemption has given rise to a very earnest controversy and upon its elaborate arguments have been submitted. All of the property, real and personal, purports to be covered by the trust deed, and all of it is used together as a unit to carry on a single enterprise, and substantially all of it is essential to the successful operation of the plant. Comparatively speaking, the personal property is of small value, and yet it is substantial. If the sale is under a degree of foreclosure and the usual course is pursued, the sale of the real property would be subject to redemption for a year, whereas the personal property would have to be sold outright with absolute title and no period of redemption, thus possibly separating the two classes of property, not without some sacrifice. The Trustee urges a sale without redemption. The intervenor Hashimoto representing an organization of a considerable number of the preferred stockholders, very earnestly joins in this contention. Otherwise than by the company itself, the [108] unsecured creditors can hardly be said to be represented in the proceedings, Hashimoto does not speak for all, but does speak for a representative number of the preferred stockholders. The sugar company strongly opposes such a sale, and argues in the first place that it cannot be legally made if the sale is had upon the foreclosure of the trust deed, and that as a matter of expediency it ought not to be made either upon such a sale or at a receivership sale.

Strictly speaking there is no competent, definite evidence touching the reasonable value of the com-

pany's property, either in parts or as a whole. There is in the record a circular issued under the authority of the Hashimoto organization containing a statement to the effect that the property has been appraised by reliable appraisers who fixed the value at $1,333,200, and references by the various parties to the controversy have been made to this estimate, and at no time, so far as I recall, has it been seriously suggested that the property could be sold for a greater amount. If that be true it is apparent that the common stockholders and the company, in so far as it represents only the common stockholders, have no real interest in the question of whether the sale is made with or without redemption, for the aggregate of the secured claims, the unsecured claims, the taxes, and the unpaid expenses of the receivership and of the trustee, taken together with the amount of outstanding preferred stock, which must be paid before anything could go to the common stock, will very greatly exceed the amount which there is any reason to expect could be gotten for the property at a sale, either with or without redemption.

In view of the heavy indebtedness of the receivership, if we take into consideration the large item of taxes which the receiver has now been directed to pay by the issuance of receiver's certificates, constituting a first lien upon the property, I am inclined to the view that I should before resorting to foreclosure sale, attempt a receivership sale, the same to be without redemption. The considerations brought forward for an expeditious disposition of

the property, finally and absolutely, are very cogent. Some preparation must be made within the near future for the season of 1924, or the plant will be idle for a year with a very great incidental loss. At a receivership sale I am inclined to require that there be a bid for at least a sufficient amount to cover all the indebtedness of the company, secured and unsecured. For the reasons already explained [109] the amount of such indebtedness cannot at this time be definitely stated, but if we take March 1st, 1924, as the date of sale, it is safe to say that at that time the total, including accrued interest and all expenses, will range somewhere between $700,000 and $800,000, and will probably approximate $750,000. Parties interested may therefore assume that a sale without redemption will not be authorized for less than $800,000, and after conference or further hearing, and upon more mature consideration, an upset price substantially in excess of that amount may be fixed. While there is no evidence to support the intimations of ulterior motives or purposes, on the part of the trustee and the intervenor Hashimoto, in urging a sale without redemption, and on the part of the Sugar Company and minor interests in opposing such a sale, it is familiar knowledge that such a contingency is always possible in the disposition of a property of the character of that involved, and it is also well known that parties having comparatively small interests are unable to protect themselves without the aid of the court, and it shall be my purpose to see that the property is not sacri-

ficed to the profit of the powerful and to the loss of the weak. It is scarcely to be expected that the unsecured creditors are or will be in a position to protect themselves, and unless compelled by necessity I shall not be inclined to authorize a sale for an amount insufficient to take care of their claims. If at the proposed sale enough cannot be realized to cover their claims, it is not impossible that I shall conclude it only proper to leave to them at least the protection vouchsafed in the period of redemption provided for ordinary sales under foreclosure.

Upon the other hand, with such information as is now available I can hardly expect to effect a sale for an amount sufficient to cover the preferred stock in full. It would therefore seem that the preferred stockholders will be under the necessity of organizing and protecting themselves in some manner if they feel that there is a substantial equity for them. In so far as they are represented they urge a sale without redemption, and they must assume at least a part of the responsibility of seeing that at such a sale the property brings a fair price.

In order more intelligently to draft a proper order for the proposed receivership sale, I deem it necessary to have a conference with counsel and a supplemental hearing. Such a conference or hearing is accordingly fixed for January 7th at 2:00 P. M. at the courtroom at Pocatello. At such hearing I desire that: [110]

1. The claimants Lewis and Gabbey show compliance with the conditions upon which certain

items of their claims are now contingent; in default of which the items will be disallowed.

2. Complete data touching unsecured claims be made of record so that the precise amount of these claims and the interest thereon may be accurately computed. The receiver should give assistance upon this head by tabulating claims on file, with dates from which interest should be computed.

3. Complete data from which we may accurately compute the net indebtedness of the receivership, with a careful estimate of accruing expenses up to March 1st, 1925. To the matter of furnishing this data, the receiver will be expected to give his attention.

MEMORANDUM COVERING DETAILS OF LEWIS AND GABBEY CLAIMS.

A. W. LEWIS CLAIM.

Subject to a possible reduction by way of set-off the following items are admittedly correct:

(a) Note of Beet Sugar Company to Gabbey and Goodwin, and transferred by them to Lewis, for $5,000, dated September 27, 1920, with interest from its date at 8%, credit interest payments aggregating $369.89.

(b) Note of Beet Sugar Company to Goodwin, and transferred to Lewis, for $2,500, dated Sept. 27, 1920. Interest at 8% from its date.

(c) Sundry checks issued by the Beet Sugar Company in the summer and fall of 1922 for valid claims, which checks were not paid and by assignment are held by Lewis, aggregating the principal sum of $1,900.17. Against these checks charge one-

half of claim allowed Idaho Falls State Bank, See Lewis' opening brief (page 2), $659.49, leaving a net principal of $1,240.68. Add interest on this net principal at 7% per annum from October 31, 1922.

(d) Valentine note for $1,000, given November 22, 1920. All interest paid up to December 20, 1921, and $500 on principal as of that date, leaving the net principal due Lewis the holder of the note of $500. Add interest [111] at 8% from December 20, 1921.

Incidentally it may be stated in passing that for the several claims aggregating over $9,000, besides interest, Lewis paid less than $5,000.

CONTESTED CLAIM.

In addition to the foregoing items, Lewis makes a claim for $5,000 which is vigorously contested. The claim arises out of an argument entered between the claimant and one A. G. Goodwin, who was at the time President of the Beet Sugar Company, by the terms of which in consideration of $5,000 to be paid to the claimant he was to give all of his time to "refinancing" the Beet Sugar Company. This contract is dated June 20, 1922.

At the hearing before the examiner, the questioning of the claimant touching the transaction was so grossly and persistently violative of the most elementary rules of evidence that I have seriously doubted whether any consideration at all should be given to the testimony. Not only were the questions highly leading, but in vital respects they were so formulated as to elicit nothing but incom-

petent conclusions, and sometimes contents of records or other written instruments. It is quite inconceivable that such a course would have been pursued had the hearing been before the court instead of an examiner.

But according to such "evidence" every reasonable intendment, I am still inclined to reject the claim in its entirety.

In the first place I do not think it is shown that the written memorandum relied upon ever became an obligation of the Beet Sugar Company. On the face of it, it does not purport to be such an obligation, but only the agreement of A. G. Goodwin. But if it were otherwise, it is not shown that Goodwin had any authority to enter into an obligation of the character on behalf of the Beet Sugar Company. By interrogating the claimant in the manner above described, counsel got him to express his conclusion that the board of directors ratified the agreement, but he specifically admits that he doesn't know that they were ever advised of the existence or of the terms thereof. And finally I am inclined to think the instrument void for indefiniteness. [112]

There is a suggestion of possible recovery upon the basis of *quantum valebat,* but the only testimony as to the value of claimant's services is so indefinite and so inconsistent that no award could be made under that theory, and besides it isn't shown that the services were of any value or benefit to the company.

But in the second place if we assume the agreement valid and binding upon the company, plainly

under his own testimony the claimant himself failed to perform and is chargeable with a breach of the agreement. The reason he assigns for his failure is so trivial as to raise the question of his good faith. Because one of the stockholders demanded a consideration for turning his stock over to a voting trust which was part of the scheme for "refinancing" from which claimant was to receive a very substantial private profit, claimant professes to have become "disgusted," and thereafter practically gave up consideration of "refinancing" the company and turned his attention to the organization of a group of its stockholders. If, as for present purposes we are assuming, the company was a party to the contract, it had no obligations touching the attitude or conduct of its stockholders. They were not subject to its control in respect to the disposition of their stock, and hence the demand by which claimant was "disgusted," even if unreasonable, did not constitute a breach or warrant claimant in declining to do what he had agreed to do.

In the third place it was a gross disregard of his duty for claimant to seek to refinance the company in the manner explained by him. He was to receive $5,000 in cash for his services, and he was to "devote" himself "entirely" to the enterprise. It was his duty to "refinance" on the best terms possible for the company. The duty was such that his relation to the company was highly fiduciary. Of necessity the company must rely upon his judgment, and to be faithful to his trust he must remain

disinterested. He could not serve two masters. And yet while he was thus being paid $5,000 for furthering and safeguarding the interests of his principal, he set on foot a scheme, which, if carried out, would be onerous to the company at best, and out of which he was privately, and so far as appears, secretly to receive a very considerable profit. [113]

For the reasons stated the claim of $5,000 for compensation or salary will be denied.

SET-OFF.

The claim by the Beet Sugar Company of a set-off against the admitted claims of Lewis, hereinbefore discussed, arose in this way:

Some time after claimant entered into the agreement with Goodwin, above discussed, it became apparent that failure was wholly probable. The credit of the company was exhausted and substantially the only salable asset it had was a considerable quantity of molasses—a by-product from the manufacture of sugar. To hinder and defeat the general creditors who had a right to attach, and were threatening to resort to that remedy, some of the officers of the company entered into a collusive understanding with Lewis, by which an ostensible but not a real sale of this molasses was made to him. Accordingly he took possession of and sold the molasses to the Amalgamated Sugar Company, and received in part payment of the purchase price the aggregate sum of $6,512.73 which amount he admittedly deposited in a bank in his name, but as already indicated he secretly held the deposit in trust for

the company. Upon subsequent demands made by the officers of the company he declined to pay over this money or render any account therefor. At the hearing before the examiner he exhibited a "statement" showing that he and Goodwin had absorbed the entire deposit. One item of this statement is "Expenses of A. W. Lewis from July to Nov. 15, 1922, $1,078.27." Although knowing that he would be called upon to make disclosure of the disposition of the money, he had with him when he testified no vouchers or book account, and was unable to give any explanation of the items going to make up the total. At the final hearing in this court in October, his counsel offered a paper purporting to be signed by him, with a measure of itemization, but upon objection of the company that the paper was incompetent it was necessarily excluded. Even in this paper we are furnished with such items as "Hotel Expenses, including automobiles and other items from 4th Sept. to 8th Nov. 23, $336.57." Such a statement would be wholly inadequate, even if it were competent. The burden was upon the claimant [114] as trustee to show that he had made an authorized and honest expenditure of the funds, and he having failed so to do credit for the entire item must be denied.

Another item is $2,743.91 paid to Goodwin to cover his "traveling expenses." Touching the details we have no competent evidence, but for reasons now to be stated an extended discussion is not to be necessary. The claimant called as a witness one Broberg, who was at one time a director and auditor

of the company, and elicited from him the information, in conclusion of his testimony, that this Goodwin account had been duly checked up by the company and allowed for $2,621.12, that being $122.81 less than the amount Lewis claims to have paid on account thereof. The same witness further testified that upon such audit a note was duly executed by the company and delivered to Goodwin on April 26th, 1922, for $2,140.30, and on October 5th, 1922, another note for the balance of $480.82, and it further appears that these notes are outstanding against the company.

The same witness testified that most of the other items in the Lewis statement are correct, and it further appears that some of them are supported by vouchers. Two items, however, namely $300.00 and $20.00, to Goodwin on account of salary, are conceded by claimant's counsel to be incorrect, and these, together with the difference above noted of $122.81, making a total of $442.81, it is further conceded should be charged back to Lewis.

Summarized, therefore, the molasses account stands as follows:

Claimant received $6,512.73. He paid out irregularly, but for the use and benefit of the company, $2,370.55, leaving a balance of $4,142.18, with which, together with interest thereon from November 1st, 1922, he is chargeable, and the same will be deducted from his admitted claims.

It is to be added that at the hearing his counsel suggested that they would make an effort to procure and deliver up for cancellation the two notes

executed by the company to Goodwin, which were still outstanding. If these notes are procured and delivered for cancellation, claimant will be given further credit for the amounts thereof. [115]

A. W. GABBEY CLAIMS.

The facts pertaining to these claims are so fully stipulated (Examiner's Transcript, p. 39 et seq.) that I shall not take the space or time to restate them here, but shall discuss only the questions left open for decision, in making up the decree or order resort must be had both to the stipulation and this memorandum.

In the main the amounts claimed by Gabbey are conceded to be due, and he should have judgment therefor, upon certain reasonable and stipulated conditions, which so far as I am advised have not been complied with. They are:

1. Delivery into court of the notes evidencing the claims which are based upon notes, namely: Notes for $2,500, $5,000, $300.00, $1,358.49, $423.62, $125.00, $61.38 and $480.82. (This latter note would seem to be one of the two notes referred to in the latter part of the discussion of the Lewis claims, and of course cannot be allowed to both Gabbey and Lewis. In that discussion it is referred to as being payable to Goodwin, and under the stipulation to either Goodwin or Gabbey. If Gabbey produces and files this note, he will, in the absence of a contest, be given credit for it, and upon the other hand, if Lewis produces and files it, in the absence of a contest, credit will be given to him therefor.)

I do not deem it necessary to have a release touch-

ing the three notes represented as being held as collateral by the Rigby Bank, but the notes themselves must be delivered up for cancellation by Gabbey before he can be given credit therefor.

2. The other item of the claim is $1,047.10, the same being the aggregate amount of a number of unpaid checks, issued to Gabbey by the company, or to divers persons to whom it was indebted. They are admitted to be nothing more, in effect, than memoranda of amounts justly due the payees named, or their assignees, and before Babbey can be given credit therefor he must produce evidence that such amounts have been paid on behalf of the company, and that the original claimants no longer have any valid claim on account therefor against the company. He should produce either receipts showing that he has satisfied the payees, or orders or assignments, or some other satisfactory evidence protecting the company against a double charge. He should further produce a verified statement [116] that no one of the items evidencing by the checks is included in any one, either of his other claims or of Goodwin's claims assigned to and presented by Lewis.

3. Claimant guaranteed two claims against the Sugar Company, one in favor of the Rigby Star for $859.71, and another to Hamberg & Sells for $566.61. Obviously he cannot have credit for these items until he has actually paid them. As evidence of such payment he must present duly authenticated receipts or orders from the two creditors.

4. There will be charged against Gabbey, and

deducted from the amount otherwise found to be due him, one-half of the claim of the Idaho Falls State Bank, the same as in the case of the Lewis claim and for the same reasons.

[Endorsed]: U. S. District Court, District of Idaho. Filed Dec. 28, 1923. W. D. McReynolds, Clerk. [117]

"Order issued January 8, authorizing Receiver to solicit bids for lease of property for year 1924." [118]

"Order issued authorizing Receiver and Auditor to determine amount of unsecured claims." [119–120]

Copy.

MEMORANDUM ORDER OF SALE OF PROPERTY BY RECEIVER.

January 19, 1924.

To the Attorneys of Record in the Beet Growers Sugar Company Case:

Gentlemen:

Upon consideration of the proposed decree, together with the objections thereto, and the status of the case, I have found it extremely difficult to work out a decree which will give reasonable protection to all parties in interest, and I have therefore practically concluded to follow my original conclusion that a sale should be made by the receiver. To that end, I have attempted to work out an order, a rough draft of which is enclosed for your consideration and suggestions.

I should like to have you give the matter im-

mediate consideration and make such suggestions, if any, as you care to make so that I may have them not later than Thursday of next week, that is January 24th. Little delay will thus be entailed because, on account of apparent inaccuracies in the decree as proposed, and its inadequacy in some particulars, it is not in proper condition to be signed.

Very truly yours,
(Signed) FRANK S. DIETRICH,
U. S. District Judge. [121]

In the District Court of the United States in and for the District of Idaho, Eastern Division.

COLUMBIA TRUST COMPANY, a Corporation,
Plaintiff,

vs.

BEET GROWERS SUGAR COMPANY, a Corporation, et al.,
Defendants.

DRAFT OF PROPOSED ORDER FOR SALE BY RECEIVER.

It appearing:

1. That the net indebtedness of the Receiver herein, after crediting the $35,623.00 still to be paid to the receiver on account of current lease, aggregates approximately $67,000, for the payment of which there are no available funds or income.

2. That the taxes for 1923, amounting to $12,-810.00 besides penalties and interest, are unpaid:

3. That as itemized in Exhibit "A" hereto attached, there is due on outstanding bonds secured by trust deed on all of the property of the defendant company, Thirty-three Thousand, Six Hundred and Eighty-four and 69/100 ($33,684.69) Dollars, inclusive of principal and interest thereon computed to January 15th, 1924, and upon divers claims secured severally by the other bonds covered by said trust deed, aggregating ——, inclusive of principal and interest computed up to January 15th, 1924, as appears in detail in said Exhibit "A";

4. That as is disclosed in the memorandum decision filed herein December 28th, 1923, there are judgments constituting liens upon the property of the defendant subject to said trust deed aggregating Three Thousand, One Hundred and Ninety-six and 79/100 ($3,196.79) Dollars, with interest [122] thereon at the rate of 7 per cent per annum from October 20th, 1922;

5. That there are numerous unsecured claims which it is estimated will, with interest, approximate Two Hundred Thousand and no/100 ($200,-000.00) Dollars.

6. That allowances must be made to cover compensation of trustee for services rendered and to be rendered, and for its expenses accrued and accruing, inclusive of attorney fees, and for accrued and accruing expenses of the receivership, all of which aggregate several thousand dollars;

7. And it therefore appearing, that the total in-

debtedness and expense to be paid will, by the time the sale of the property can be consummated, approximate at least $650,000.00;

8. And it further appearing that it will be necessary to sell all of the property of the defendant Beet Growers Sugar Company to pay said indebtedness, and that said property constitutes a single operating unit, and should be sold together in one parcel, and that in view of the status and exigencies of the case a better price can in all probability be gotten by the receiver than by a master upon foreclosure sale, and that by a receiver's sale the rights of all parties interested may be more fully protected;

IT IS THEREFORE ORDERED, That the receiver be and he is hereby authorized and directed, with all reasonable dispatch, to make a sale of said property, subject to the approval of the Court.

Time and Place of Sale:

Said sale shall be made at such time as the receiver shall designate, not earlier on the day fixed than ten o'clock in the morning, or later than five o'clock in the afternoon, at the front door of the courthouse at Rigby, Jefferson County, Idaho.

Notice of Sale:

Notice of such sale, particularly stating the time and place thereof, shall be published by the receiver at least once a week for at least four weeks next prior to the date of the sale, in a newspaper of general circulation published at Rigby, Idaho, and in a newspaper of general circulation published

at Idaho Falls, Idaho, and a newspaper [123] of general circulation published at Salt Lake City, Utah. In addition to stating the time and place, said notice shall contain a brief general description of the property to be sold, with the added clause that whether particularly referred to or not the description is intended to cover and include all of the property, real, personal and mixed, owned by the Beet Growers Sugar Company, constituting principally a beet sugar factory at or near Rigby, Idaho, with all its appurtenances and all property used in connection therewith, and with the additional statement that any error or deficiency in the description shall not invalidate the sale.

Said notice shall contain the further statement that it is given pursuant to this order, appropriate and specific reference to which shall be made, with the further statement that the sale will be made upon the terms and subject to the conditions and directions of the order, a copy of which will be furnished without charge to anyone interested upon application to the undersigned receiver at his office at Idaho Falls, Idaho.

Payment by Purchaser:

Any competent person or corporation may become a purchaser at such sale, but immediately upon the announcement by the receiver of the acceptance of a bid, subject to the Court's approval, the bidder must pay to the receiver $10,000.00 to be credited upon the purchase price if the Court approves the sale, and to be forfeited to the receiver as liquidated damages in case the bidder

fails, upon such approval of sale, to pay the residue of the purchase price in the manner and at the times as herein specified.

In case of a failure of the purchaser to comply with this condition, the receiver will forthwith reject such bid and proceed with the sale the same as if such bid had not been made.

Within five days after the approval of a bid by the Court, the purchaser shall pay an additional amount, which taken together with the initial payment, shall equal at least 10 per cent of the whole price bid. This additional amount also shall be forfeited to the receiver as liquidated damages in case of failure of the purchaser to make good his bid and pay the whole amount of the purchase price as herein provided. Both of said payments [124] shall be made in money or the equivalent thereof, namely by draft or certified check approved by the receiver.

The remaining portion of the purchase price may be paid in three equal installments, thirty, sixty and ninety days after the approval of the sale, with interest thereon at the rate of 7 per cent per annum from the date of the order of approval by the Court, and at least 10 per cent of each installment shall be in money, or its equivalent as above defined. The residue of each installment may be paid by delivery to the receiver of receiver's certificates, representing outstanding indebtedness of the receiver, owned by or assigned to the purchaser, at their full face value; or by outstanding bonds now held by Hawley & Hawley, J. F. Feather-

stone or Phillip Horan, or by the claims secured by bonds as collateral, together with such collateral bonds, all as appears in Exhibit "A," hereto attached. Provided that said bonds, or claims with collateral bonds, are turned over by the purchaser to the receiver, and provided further that said bonds and claims with collateral bonds shall be accepted by the receiver for only such amount as would equal the distributive share of the proceeds of the sale to which such bonds and claims would be entitled in case the full purchase price of the property has been paid in money.

When a sufficient amount has thus been received to cover all the indebtedness of the receiver, the compensation and expense of the trustee and its attorney, and the secured indebtedness represented by the outstanding bonds and claims with collateral bonds, the residue may be paid either in money or by the turning over to the receiver of unsecured claims at a value equivalent to the distributive share such claims would be entitled to receive were the purchase price paid in cash.

Title and Possession of Property Sold:

The sale of the property will be made free from all adverse claims and all incumbrances, except the taxes and penalties thereon for 1923, which are unpaid, the taxes which may be levied for 1924, and the existing [125] lease of the sugar factory by the receiver to one Hashimoto, which will terminate at the opening of the operating season of 1924. In this lease and the rentals due or to become due thereon, the purchaser shall acquire no

interest or right. But as to the lease of the plant for 1924, if any shall be made by the receiver, with the approval of the Court, prior to the date of sale, the purchaser shall be deemed to be the assignee thereof and shall succeed to all the rights and all the obligations of the receiver thereunder, and the sale shall be deemed to have been made subject to the rights and the right of possession of the lessee under such sale.

Upset Price:

No bid for the property shall be accepted by the receiver for a sum less than $650,000.00.

Redemption:

It being considered that if possible the sale should be made subject to the right of redemption by parties interested, such right to be exercised within a reasonable time and upon reasonable terms, with reasonable inducements to the purchaser to make the purchase subject to such right; it being noted that the upset price so fixed will be sufficient to cover all indebtedness of the company, and that therefore, in addition to the company the only interested parties are the preferred stockholders who have rights and interests that the company may not be willing or able to protect.

IT IS FURTHER ORDERED, that the said sale be made subject to the right of redemption, such right to be exercised within six months following the date of the approval of the sale. To redeem from the purchaser, the redemptioner must pay to him or it, or to the receiver, or to a trustee to be a trustee to be appointed by the Court for that

purpose, for the use and credit of the purchaser, not only the purchase price in full which the purchaser has paid for the property, but interest thereon at the rate of 10 per cent from the date of the approval of the sale, and in addition thereto the sum of Fifteen thousand ($15,000.00) Dollars. [126]

The Beet Growers Sugar Company shall have the exclusive right so to redeem during the first three months of the period, and the further right to redeem thereafter and within the six months if no other redemption has been made.

If the company does not redeem in the first three months, any organization of the preferred stockholders, comprising at least 30 per cent of the outstanding preferred stock, may redeem.

Provided and upon condition that such organization shall not exclude any preferred stockholders, but that within a reasonable length of time, all preferred stockholders may come into the same upon an equal footing.

Instruments of Conveyance:

Upon approval by the Court of the sale, the Receiver shall, upon order of the Court, execute to the purchaser a certificate of sale with appropriate recitals of the conditions hereof, relative to the redemption and at the expiration of the period of redemption, if no redemption shall have been made, the purchaser, or in case of redemption, the redemptioner, shall be entitled to appropriate instruments of conveyance to be made either by the receiver or a Special Master to be appointed for that purpose all pursuant to the further orders of the Court, and

if the property be not redeemed by the company it will be required to execute and deliver confirmatory conveyances.

Until such conveyances are executed, the property shall remain or be deemed to be in the possession and subject to the supervision of the Court.

Sale Without Redemption:

IT IS FURTHER ORDERED, that should the Receiver be unable, after reasonable effort, to procure an offer of at least $650,000.00 for the property, subject to redemption, he is directed to continue the sale over to the following day after making such effort, and then offer the property for sale without redemption, but upon such sale he is not to accept any bid for less than $750,000.00. The terms of payment for such sale is to be in substantial conformity with the requirements hereinbefore set forth for sale with redemption. [127]

Proceeds of Sale:

The proceeds of the sale paid to the receiver or into Court from time to time shall be kept and distributed in the manner and to the persons and upon the conditions hereafter to be ordered and prescribed by appropriate orders made from time to time as the need may arise.

Description of Property:

The following is a description of the property to be sold:

(Here will be entered a description substantially as set forth in the proposed decree prepared by counsel for plaintiff.)

[Lodged.] [128]

[Title of Court and Cause.]

ORDER FOR SALE BY RECEIVER.

It appearing:

1. That the net indebtedness of the Receiver herein, after crediting the $35,623.00 still to be paid to the Receiver on account of current lease, aggregates approximately 67,000.00, for the payment of which there are no available funds or income;

2. That the taxes for 1923, amounting to $12,-810.00, besides penalties and interest, are unpaid;

3. That as itemized in Exhibit "A," hereto attached, there is due on outstanding bonds secured by trust deed on all of the property of the defendant company, Thirty-three Thousand, Six Hundred and Eighty-four and 69/100 ($33,684.69) Dollars, inclusive of principal and interest thereon computed to January 15th, 1924, and upon divers claims secured severally by the other bonds covered by said trust deed, aggregating Three Hundred and Three Thousand, Six Hundred and Sixty and 64/100 ($303,-660.64) Dollars, inclusive of principal and interest computed up to January 15th, 1924, as appears in detail in said Exhibit "A"; a total secured indebtedness of Three Hundred and Thirty-seven Thousand, Three Hundred and Forty-five and 33/100 ($337,-345.33) Dollars. [129]

4. That, as is disclosed in the memorandum decision filed herein December 28th, 1923, there are judgments constituting liens upon the property of the defendant subject to said trust deed aggregating Three Thousand One Hundred and Ninety-six and

79/100 ($3,196.79) Dollars, with interest thereon at the rate of 7 per cent per annum from October 20th, 1922.

5. That there are numerous unsecured claims, which it is estimated will, with interest, approximate Two Hundred Thousand and no/100 ($200,000.00) Dollars;

6. That allowances must be made to cover compensation of trustee for services rendered and to be rendered, and for its expenses accrued and accruing, inclusive of attorney fees, and for accrued and accruing expenses of the receivership, all of which aggregate several thousand dollars;

7. And it therefore appearing that the total indebtedness and expense to be paid will, by the time a sale of the property can be consummated, approximate at least $650,000.00;

8. And it further appearing that it will be necessary to sell all of the property of the defendant Beet Growers Sugar Company to pay said indebtedness, and that said property constitutes a single operating unit, and should be sold together in one parcel, and that in view of the status and exigencies of the case a better price can in all probability be gotten by the Receiver than by a Master upon foreclosure sale, and that by a Receiver's sale the rights of all parties interested may be more fully protected;

IT IS THEREFORE ORDERED, That the Receiver be and he is hereby authorized and directed, with all reasonable dispatch, to make a sale of said property, subject to the approval of the Court.

Time and Place of Sale:

Said sale shall be made at such time as the Re-

ceiver shall designate, not earlier on the day fixed than ten o'clock in the morning, or later than five o'clock in the afternoon, [130] at the front door of the courthouse at Rigby, Jefferson County, Idaho. Notice of Sale:

Notice of such sale, particularly stating the time and place thereof, shall be published by the Receiver at least once a week for at least four weeks next prior to the date of the sale, in a newspaper of general circulation published at Rigby, Idaho, and in a newspaper of general circulation published at Idaho Falls, Idaho, and a newspaper of general circulation published at Salt Lake City, Utah. In addition to stating the time and place, said notice shall contain a brief general description of the property to be sold, with the added clause that whether particularly referred to or not the description is intended to cover and include all of the property, real, personal and mixed, owned by the Beet Growers Sugar Company, constituting principally a beet sugar factory at or near Rigby, Idaho, with all its appurtenances and all property used in connection therewith, and with the additional statement that any error or deficiency in the description shall not invalidate the sale.

Said notice shall contain the further statement that it is given pursuant to this order, appropriate and specific reference to which shall be made, with the further statement that the sale will be made upon the terms and subject to the conditions and directions of the Court, copy of which will be furnished without charge to anyone interested upon application to the undersigned Receiver at his office at Idaho Falls, Idaho.

Adjournment and Further Notice:

The Receiver shall have the power to adjourn the sale from time to time to a date certain, and in case of failure to receive a bid complying with the conditions herein prescribed he shall orally announce the adjournment of the sale to a date certain, and if, after failure to obtain a satisfactory bid under the conditions herein prescribed, the Court shall make an order modifying such conditions and directing that the property [131] be again offered for sale. It shall not be necessary to republish in full the original notice of sale, but in the new notice it shall be necessary only to state the time and place and the change in the conditions and terms made by the order of the Court, with a reference to the original publication for further particulars.

Inspection of Property:

The property advertised to be sold may be inspected by intending bidders prior to such sale, subject to such reasonable requirements as the receiver may prescribe.

Payment by Purchaser:

Any competent person or corporation may become a purchaser at such sale, but immediately upon the announcement by the receiver of the acceptance of a bid, subject to the court's approval, the bidder must pay to the receiver $10,000.00, to be credited upon the purchase price if the court approves the sale, and to be forfeited to the receiver as liquidated damages in case the bidder fails, upon such approval of sale, to pay the residue

of the purchase price in the manner and at the times as herein specified.

In case of failure of the purchaser to comply with this condition, the receiver will forthwith reject such bid and proceed with the sale the same as if such bid had not been made.

Within five days after the approval of a bid by the court, the purchaser shall pay an additional amount which taken together with the initial payment, shall equal at least 10 per cent of the whole price bid. This additional amount also shall be forfeited to the receiver as liquidated damages in case of failure of the purchaser to make good his bid and pay the whole amount of the purchase price as herein provided. Both of said payments shall be made in money, or the equivalent thereof, namely, by draft or credited check approved by the receiver.

The remaining portion of the purchase price may be paid in three equal installments, thirty, sixty and ninety days [132] after the approval of the sale, with interest thereon at the rate of 7 per cent per annum from the date of the order of approval by the court, and at least 10 per cent of each installment shall be in money, or its equivalent as above defined. The residue of each installment may be paid by delivery to the receiver of receiver's certificates, representing outstanding indebtedness of the receiver, owned by or assigned to the purchaser, at their full face value; or by outstanding bonds now held by Hawley & Hawley, J. F. Featherstone, or Philip Horan, or by the claims secured by bonds as collateral, together with such collateral bonds,

all as appear in Exhibit "A," hereto attached. Provided that said bonds, or claims with collateral bonds, are turned over by the purchaser to the receiver, and provided further that said bonds and claims with collateral bonds shall be accepted by the receiver for only such amount as would equal the distributive share of the proceeds of the sale to which such bonds and claims would be entitled in case the full purchase price of the property had been paid in money.

When a sufficient amount has thus been received to cover all the indebtedness of the receiver, the compensation and expense of the trustee and its attorney, and the secured indebtedness represented by the outstanding bonds and claims with collateral bonds, and the judgments herein above referred to which constitute second liens, the residue may be paid either in money or by the turning over to the receiver of unsecured claims at a value equivalent to the distributive share such claims would be entitled to receive were the purchase price paid in cash.

Title and Possession of Property Sold:

The sale of the property will be made free from all adverse claims and all incumbrances, except the taxes and penalties thereon for 1923, which are unpaid, the taxes which may be levied for 1924, and the existing lease of the sugar factory by the receiver of one Hashimoto, which will terminate before the opening [133] of the operating season of 1924. In this lease and the rentals due or to become due thereon, the purchaser shall acquire

no interest or right. But as to the lease of the plant for 1924, if any shall be made by the receiver, with the approval of the court, prior to the day of sale, the purchaser shall be deemed to be the assignee thereof and shall succeed to all the rights and all the obligations of the receiver thereunder, and the sale shall be deemed to have been made subject to the rights and the right of possession of the lessee under such lease.

Upset Price:

No bid for the property shall be accepted by the receiver for a sum less than $650,000.00.

Redemption:

It being considered that if possible the sale should be made subject to the right of redemption by parties interested, such right to be exercised within a reasonable time and upon reasonable terms, with reasonable inducements to the purchaser to make the purchase subject to such right; and it being thought that the upset price so fixed will be sufficient to cover all indebtedness of the company, and that therefore, in addition to the company the only interested parties are the preferred stockholders, who have rights and interests that the company may not be willing or able to protect; and it also having been shown that it is highly important that the sugar factory be kept a going concern and that it operate each year, and that to that end it is necessary to contract with farmers for the raising of sugar beets, beginning about February 1st of each year for the season's run of the current year, and that therefore a period of

redemption longer than six months would extend into the 1925 season, and hence jeopardize operations for that year;

IT IS FURTHER ORDERED, That the said sale be made subject to the right of redemption, such right to be exercised within six months following the date of the approval of the sale. To redeem from the purchaser, the redemptioner must pay to him or [134] it, or to the receiver, or to a trustee to be appointed by the court for that purpose, for the use and credit of the purchaser, not only the purchase price in full which the purchaser has paid for the property, but interest thereon at the rate of 10 per cent from the date of the approval of the sale, and in addition thereto the sum of Fifteen Thousand ($15,000.00) Dollars.

The Beet Growers Sugar Company shall have the exclusive right so to redeem during the first three months of the period, and the further right to redeem thereafter and within the six months if no other redemption has been made. If the company does not redeem in the first three months, any organization of the preferred stockholders, comprising at least 30 per cent of the outstanding preferred stock, may redeem; *Provided and upon condition* that such organization shall not exclude any preferred stockholder, but that within a reasonable length of time, all preferred stockholders may come into the same upon an equal footing; And Provided Further that the right of redemption herein provided for is intended primarily for the protection of the preferred stockholders and all of

them, and for their benefit, and is granted upon the condition and with the reservation that it shall not be assigned, transferred or encumbered without the consent of this Court first obtained and without such consent any attempted assignment, transfer or encumbrance will be void.

Upon approval by the court of the sale, the receiver shall, upon order of the court, execute to the purchaser a certificate of sale with appropriate recitals of the conditions hereof, relative to the redemption, and at the expiration of the period of redemption, if no redemption shall have been made, the purchaser, or in case of redemption, the redemptioner, shall be entitled to appropriate instruments of conveyance to be made either by the receiver or a special master to be appointed for that purpose, all pursuant to the further orders of the court, and if the property be not redeemed by the company it will be required to execute and deliver confirmatory conveyances. [135]

Until such conveyances are executed, the property shall remain or be deemed to be in the possession and subject to the supervision of the Court.

Proceeds of Sale:

The proceeds of the sale paid to the receiver or into court from time to time shall be kept and distributed in the manner and to the persons and upon the conditions hereinafter to be ordered and prescribed by appropriate orders made from time to time as the need may arise.

Description of Property:

The following is a description of the property to be sold:

(a) Those certain lots, parcels and pieces of land situate in the County of Jefferson, State of Idaho, particularly described as follows: Southwest (SW.) Corner of Section eight (8), Township four (4), North Range Thirty-nine (39) East of the Boise Meridian, running thence East Eighty-three (83) rods, thence North Eighty (80) rods, thence East Seventy-seven (77) rods, thence North Sixty-three (63) rods, more or less, to the Parks and Lewisville Canal, thence along the said canal to the west line of said Section eight (8); thence South One Hundred Twenty-seven (127) rods to the place of beginning, but subject to that certain right-of-way of the Oregon Short Line Railroad Company One Hundred (100) feet wide, running diagonally across the above described land in a Northeasterly and Southwesterly direction, together with all buildings, structures, residences, beet sheds and other improvements upon said premises, and all canals, ditches and water rights appurtenant thereto, or used in connection therewith, together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

(b) Also all machinery, equipment, supplies and other personal property of every kind or nature owned by the defendant Beet Growers Sugar Company, and now in the posses-

sion of the receiver, which has heretofore been used in connection with the operation of the sugar factory on the premises hereinbefore described, including, but not limited to, four (4) shares of the capital stock of the Rigby Canal Company, and Nine (9) shares of the capital stock of the Lewisville Canal Company, representing rights to the use of water for the irrigation of the land hereinbefore described or the operation of the sugar factory situate thereon; one (1) steel traveling crane for distributing beets, one (1) miscellaneous lot of laboratory and electrical supplies, bolts, nuts, washers, screws, rivets, cotter keys, packing, storeroom supplies, pipe and pipe fittings, tools, oils, greases, automobile and truck supplies and parts; four (4) typewriter desks, four (4) oak typewriter desks, two (2) Underwood typewriters, one (1) L. C. Smith typewriter, one (1) Royal typewriter, four (4) oak roll top desks, three (3) oak Cutler desks, three (3) oak flat top desks, two (2) standing desks, [136] two (2) small oak tables, eight (8) oak swivel chairs, six (6) oak arm chairs, five (5) straight back chairs, six (6) oak arm chairs, one (1) small swivel stool, one (1) stationary stool, two (2) safes, three (3) adding machines, one (1) check protector, two (2) electric fans, four (4) section filing units, one (1) Hotchkiss punch No. 1, one (1) Hotchkiss punch, No. 2, one (1) cupboard, one (1) index file, one (1) steel cabinet, one (1) Tagliabue Registering

thermometer, one (1) surveying outfit, consisting of transit, tripod, rods, chains, etc., eight (8) wire paper baskets, five (5) brass cuspidors, one (1) nickel cuspidor, one (1) hall tree, twelve (12) wire trays, six (6) duplex automobile trucks, one (1) Quad automobile truck, six (6) Troy Trailers, four (4) Cultipackers, four (4) dump wagons, one (1) Ford coupes, Forty-two (42) small Tare scales, forty-six (46) beet drills, six (6) sprayers, four (4) beet wagons, four (4) Featherstone beet loaders, two (2) John Deere beet loaders, thirty-five (35) wagon scales, six (6) High Line dumps, located respectively at the Ball Ranch, Lewisville and Lufkin in Jefferson County, at Thornton and Winder in Madison County, and at Wilford in Fremont County, Idaho.

(c) Also all right, title and interest of the defendant Beet Growers Sugar Company and of the receiver thereof in and under that certain lease of the property hereinbefore described, bearing date September 13, 1923, executed by A. V. Scott as receiver, in favor of E. D. Hashimoto, Treasurer, and in and under such further lease of said premises and personal property as the receiver may enter into in behalf of the defendant Beet Growers Sugar Company, during the further progress of this suit; Provided that the purchaser shall not be entitled to receive any rentals under said first named lease, due or to become due to the receiver.

Dated: Boise, Idaho, January 25th, 1924.

FRANK S. DIETRICH,
District Judge. [137]

"Bonds in hands of claimants 337,345.35." [138]

[Title of Court and Cause.]

SUPPLEMENTAL ORDER OF SALE.

The property directed to be sold by the order of January 25th, 1924, having now been leased by the receiver to the Utah-Idaho Sugar Company for the season of 1924:

To the end that there may be no misunderstanding by intending purchasers of references in said order of sale to the possible lease for the current season, IT IS DECLARED AND FURTHER ORDERED that the purchaser shall succeed to the rights of the Receiver as lessor in said lease as of the date of the Receiver's sale, and shall be entitled to receive the payments of rental under said lease thereafter to become due, but shall acquire no interest in or right to the initial payment of $25,000.00 made to the Receiver at the time of the execution of the lease; and

IT IS FURTHER DECLARED AND ORDERED that in case of redemption, the redemptioner and not the purchaser at the sale shall be entitled to the rentals which are to be paid by the lessee subsequent to the date of sale, and unless otherwise ordered by the Court the property sold shall be deemed to be in the possession and under

the control of the Court until the period of redemption shall have expired and instruments of transfer executed to the purchaser or the redemptioner, [139] and in case of payment by the lessee of any installment of rent after the date of sale, it shall be paid to the Receiver or a Special Master appointed for that purpose, same to be held in trust for the purchaser, or in case of redemption for the redemptioner, and to be paid over at the time the instruments of transfer are executed and delivered.

The receiver is directed to call the attention of bidders to this supplemental order and to such lease on the day of sale, and is also directed to append to the notice of sale which is now in the course of publication, the following:

Contemplating bidders are hereby notified of a lease by the undersigned Receiver to the Utah-Idaho Sugar Company for the 1924 season of the property to be sold, and of a supplemental order defining and limiting the rights of purchasers therein, said lease being dated February 6th, 1924, and the order being dated February 7th, 1924.

A. V. SCOTT,
Receiver.

Dated Boise, February 7th, 1924.

FRANK S. DIETRICH,
District Judge.

[Endorsed]: U. S. District Court, District of Idaho. Filed Feb. 7, 1924. W. D. McReynolds, Clerk. By M. Franklin, Deputy. [140]

[Title of Court and Cause.]

OBJECTIONS TO PROPOSED DECREE IN THE ABOVE-ENTITLED ACTION AS THE SAME HAS BEEN PREPARED FOR PLAINTIFF WHICH ARE MADE BY THE DEFENDANT BEET GROWERS SUGAR COMPANY.

I.

In paragraph 2, the rate of interest should be corrected from 8 per cent, and to read "7 per cent."

II.

Strike out all of paragraph 6, for the reason that heretofore the charter of the Beet Growers Sugar Company was reinstated and the annual tax paid as required by law, and certificates of reinstatement issued by the proper authorities. If this is not true then it was incumbent upon the plaintiff herein to have the directors of the corporation made parties defendant and as trustee for the defunct corporation in order that proper judgment could be entered herein.

III.

The language embraced in the concluding portion of paragraph 7, beginning on line 31 of page 7, to the conclusion of said paragraph should be eliminated and be made to read as follows: [141]

> "That any party to this suit or any other person who may bid for or purchase the property at said sale, and further that the property so advertised to be sold, may be inspected by

intending bidders prior to such sale, subject to such reasonable requirements as the said Receiver may prescribe."

The language of the proposed decree apparently limits those who may become purchasers at said sale.

IV.

Paragraph No. 9 should be amended so as to permit the plaintiff to apply on any bid it should make the amount found to be due upon the bonds, but enough cash shall be paid to the Master to pay all costs of sale and Receiver's certificates less the amount that is due the Receiver, that will become due upon the lease from the said premises, and under no circumstances should the preferred shares of stock be permitted to be received as a part of the purchase price of said property, for after the payment of the amount found to be due upon the bonds and the unsecured claims, any amount thereafter of necessity must go to the Company for proper distribution.

V.

We object to paragraph 10, as drawn, and insist that if the Court should fix an upset price, that the same should be done before the signing of the decree, and should be included in the signing therein and paragraph 10 should be drawn in conformity to this suggestion.

VI.

We object to paragraph 12 as drawn. There should be a provision in line 19 on page 10, after the word "thereof" as follows: "After the bid of re-

demption has expired'' and provisions should be made in said paragraph, ''That if the Court should make a new lease for the year 1924 which will extend into the year 1925, that the purchasers shall not be let into the possession thereof until the expiration of said lease.'' We also object to the following language, the same being the [142] concluding portion of paragraph 12: ''And that for the purpose of exercising such statutory rights of redemption, if they elect so to do, the unsecured creditors of the defendant Beet Growers Sugar Company whose claims have been or may hereafter be adjudicated or allowed in this suit shall be regarded as and shall enjoy the status of judgment creditors of said defendant.''

VII.

We object to subdivisions 5 and 6 of paragraph 13 as drawn for the reason that the judgment creditors, Thomas George and the Idaho Farm Loan Company, and the First National Bank of Logan should be placed upon an equality with the unsecured creditors. We also object to all of subdivision 7 of said paragraph 13 for the reason that any money due, after paying the creditors, should be paid to the Beet Growers Sugar Company and would be subject to the order of distribution by said Company.

VIII.

We object to paragraph 14 and its entirety. The same should be eliminated from the decree.

IX.

Paragraph 15 should provide that if this Court ject to the order or distribution by said Company.

1924 and part of the year 1925, that the purchasers would not be let into possession until the expiration of such lease.

X.

In paragraph 16 in line 30 on page 14, the word "land" should be changed to "property."

XI.

The total of the figures as given in paragraph 4 does not appear to be correct and we suggest that these figures should be rechecked and that upon the various secured claims that there should be an uniform rate of interest fixed at 7 per cent, for the reason that that is the amount of interest the bonds draw [143] and the claims themselves ought not draw any more interest than the security provides for. The amount of the Gabby claim as verified by the company's figures are in accordance with the statement attached hereto.

XII.

The defendant Beet Growers Sugar Company earnestly objects to the inclusion in the decree of any provisions whatever that gives the preferred stockholders the right of redemption. This right of redemption should, in the judgment of the defendants, be given to the Beet Growers Sugar Company so that it can redeem for and on behalf of all of the stockholders.

The defendants, therefore, respectfully present the above objections and proposed amendments.

MARIONEAUX, KING & SCHULDER,

Attorneys for Beet Growers Sugar Company, a Corporation.

Dated this 15th day of January, 1924. [144]

[Title of Court and Cause.]

OBJECTIONS OF BEET GROWERS SUGAR COMPANY TO PROPOSED ORDER FOR SALE BY RECEIVER.

Now comes the Beet Growers Sugar Company, the defendant above named, and objects to the proposed order of sale of defendant's property by the Receiver in the above-entitled proceeding.

I.

The said defendant objects to that portion of the proposed order of sale by the Receiver which provides that said property shall first be offered for sale with a right of redemption, and in the event there shall not be received a bid of at least $650,000 for said property, subject to the right of redemption, that the sale then be adjourned for one day and the property offered for sale without redemption at not less than $750,000.

This defendant urges as grounds for said objection all the reasons and grounds heretofore stated and submitted to the Court against the sale of its property without the right of redemption, and in addition thereto submits that if an order of sale shall be entered herein directing its property to be sold subject to a right of redemption, coupled with an order directing its sale without a right of redemption, in the event a bid of $650,000 shall not be obtained upon an offer of the sale subject to the right of redemption, it is apparent that such an order of sale will tend to deter persons from bidding for said property when first offered for sale subject

to redemption and to withhold their bids in the hope that the sale will be adjourned and on the following day the property [146] offered for sale without the right of redemption.

II.

This defendant objects to any order of sale of its property, except subject to the right of redemption, and reserving all of its objections to an order of sale except subject to redemption, specifically objects to the diminution of the time of redemption from that provided by the laws of the State of Idaho to a period of six months, and to the diminution of the time within which this defendant may redeem its said property from sale, to a period of three months.

In pressing the objection just stated, this defendant calls attention to the fact that all parties to this proceeding at the last hearing before the Court, withdrew any objections which had theretofore been urged against the sale of the property subject to redemption. Further, that the Court has directed that the Receiver accept bids for a lease of the property for the coming season, and in the event a lease shall be granted the property would thereby be withdrawn from operation during the coming season by any purchaser, for which reason there is no sufficient ground for shortening the time of the period of redemption, and particularly for shortening the time to three months, within which this defendant has the right to make such redemption.

This defendant further represents that with the property leased for the coming season, such lease furnishes sufficient grounds in equity for the Court

to direct the sale of the property subject to the right of redemption and subsequent approval of the Court, eliminating from the order of sale the alternative order directing the sale of the property without redemption, in the event a sufficient bid cannot be obtained for the property upon its sale subject to the right of redemption, for the reason that the Court may, by directing the property to be sold subject to the right of redemption, thereafter enter an order directing the sale of the property without the right of redemption in case it shall be found that the property cannot be sold for a sufficient sum when offered subject to redemption. The property could be advertised and offered for sale subject to redemption and a report made to the Court of the result of such offer, leaving ample time during the period of the lease to reoffer the property for sale without redemption, in case a sufficient [147] bid should not be received at the offering of the property for sale subject to redemption. In this manner the rights of all parties could be conserved and protected, whereas the entry of an order such as is now proposed would tend to curtail the rights of this defendant as a redemptioner.

This defendant further represents that the period of three months within which under said proposed order of sale it shall have the right to redeem said property, is entirely too short a period, particularly in view of the fact that the property is to be leased during the coming season, and that if it shall be granted a longer period of time it will be able to secure the necessary funds with which to discharge

all the indebtedness now existing against its said property and thereby re-establish itself, thus enabling it to pay in full all of its creditors and hold and operate its property for the benefit of its stockholders, both preferred and common.

Respectfully submitted,
MARIONEAUX, KING & SCHULDER,
MARSHALL, McMILLAN & CROW,
H. H. HENDERSON,
Attorneys for Beet Growers Sugar Company.

[Endorsed]: U. S. District Court, District of Idaho. Filed Jan. 24, 1924. W. D. McReynolds, Clerk. By M. Franklin, Deputy. [148]

"Copy of lease executed to Utah-Idaho Sugar Company for year beginning August 1, 1922, to March 1, 1925, amount paid for lease $115,000." [149—156]

[Title of Court and Cause.]

PETITION AND OBJECTIONS.

Now comes the Beet Growers Sugar Company, one of the defendants above named, and hereby respectfully represents to this honorable Court, and petitions as follows:

I.

That heretofore and on or about the 25th day of January, 1924, this Honorable Court entered its order herein, authorizing the Receiver of this petitioner to sell at public sale all of its property, both real, personal and mixed, and principally its beet

sugar factory at and near Rigby, Idaho, with all of its appurtenances and all property used in connection therewith, and thereafter on the 7th day of February, 1924, this Honorable Court filed and entered a supplemental order of sale in respect to said property, and the conditions under which the same shall be sold.

II.

That since the filing of the order of sale on the 25th day of January, 1924, the property of the defendant company, so ordered to be sold, has been by order of this Court leased to the Utah-Idaho Sugar Company, at a fixed rental for the year [157] 1924, of $115,000.00, and $25,000.00 of said amount has heretofore been paid by said Utah-Idaho Sugar Company to the Receiver, and the balance of said payment has been secured by a good and sufficient surety bond; that it was set forth in the first paragraph of the order authorizing the Receiver's sale; that the net indebtedness of the Receiver will aggregate approximately $67,000.00, it being stated by said order that there are no funds available with which to pay said amount, but your petitioner alleges that by the payment of the $25,000.00 by the Utah-Idaho Sugar Company, said amount of indebtedness has been reduced in the sum of $25,000.00, or to approximately $42,000.00, with $90,000.00 additional to be paid during the year ending March 1, 1925; that said $90,000.00 will pay the taxes for 1923, amounting to $12,810.00, together with the interest, penalties and costs thereon, and will still leave a balance of approximately $75,000.00 with which to pay interest

on the secured indebtedness outstanding against this petitioner.

III.

That according to the recital in paragraph 3 of the order authorizing said Receiver's sale, it appears that there is a total of secured indebtedness outstanding in the sum of $337,345.33; that figuring the interest on said amount of secured indebtedness at 7 per cent for the year 1924, it would aggregate the sum of $23,614.17, and deducting this amount from the approximate sum of $75,000.00 above referred to, the Receiver will still have on hand more than $50,000.00 with which to pay Receiver's expenses, other accruing taxes and to apply on the outstanding Receiver's certificates.

IV.

That according to the report of A. V. Scott, Receiver, and E. J. Broberg, special auditor, the unsecured claims approved less proper deductions amount to the sum of $147,574; that according to said report so filed the total amount of indebtedness [158] except Receiver's compensation from January 1, 1924, and legal fees amount to $623,239.00, of this amount, however, there are unsecured claims not filed, and which claims are questioned by this petitioner in the sum of $6,428.00, and claims filed but not approved in the sum of $13,407.00, liabilities on these claims being denied. These two items amount to $19,435.00, which should be deducted from the report filed by the Receiver and auditor, and deducting said amount it would leave as shown by said report, but the sum of $603,404.00 as a total

liability of the company. From this amount is now to be deducted, or at least to be taken into account, the sum of $115,000.00 to be received for rental for the property, and deducting this amount from the total indebtedness would leave at this time approximately the sum of $488,000.00 indebtedness to which would have to be added the accruing interest, the balance of the Receiver's charges and attorney's fees, or a total indebtedness under any circumstances of not to exceed $560,000.00 at the end of the rental season.

V.

That if said property belonging to the petitioner is not sold at the present time, but should be retained in the hands of the Receiver until March 1, 1925, the company would be in a better condition financially than at the present time and no damage or loss by reason of such delay would occur to said company or to its creditors.

VI.

Your petitioner therefore respectfully represents that it is not necessary at this time to sell all or any part of the property of this petitioner to pay its said indebtedness. Petitioner admits that if said property is to be sold, it should be sold as a single operating unit and in one parcel, but in view of its present financial condition, petitioner respectfully represents that there is no immediate necessity for the sale [159] of said property or any part thereof.

VII.

Your petitioner directs attention to that portion

of the order of the Court wherein the Court specifies the property of this petitioner to be sold, and wherein it is stated that "all of the property, real, personal and mixed owned by the Beet Growers Sugar Company" shall be sold. Your petitioner respectfully represents that the only property belonging to said company which should in any event be sold should be limited to its property situate within the State of Idaho, and should not embrace any claims, demands or choses in action which said company and your petitioner may have pending and against individuals or companies without the State of Idaho; that any such claims would not be within the jurisdiction of the Court or under the control of the Receiver and are not covered by a mortgage securing the bonded indebtedness of the company or pledged as security to any of its creditors.

VIII.

Your petitioner further respectfully represents that in the event said property is sold, that the order of the Court should be modified in respect to the payment to be made for said property by the purchaser, and especially in the following particulars; that the payment should be made in cash to the Receiver, and the Receiver should not be authorized to accept in payment for said property, outstanding bonds or collateral of any kind held by the creditors of said company; that the Receiver should be required, out of the money so received, to settle and adjust in cash all proper and legal claims as the same shall have been fixed and determined by this Court, and not permit or allow the proposed pur-

chaser to speculate upon the company's securities or obligations outstanding. In other words, if any benefits are to be received [160] or made by said sale, it should operate for the benefit of the stockholders of the company and not for the purchaser of the property belonging to the company.

IX.

Your petitioner respectfully represents that at the time this Honorable Court authorized the sale of said property and directed the Receiver not to accept a bid for less than $650,000.00, the property of the sugar factory of the company situate at Rigby, Idaho, had not been leased for the 1924 season; that after the ordering of said sale and on the 6th day of February, 1924, the Receiver executed a lease, with the approval of this Court, to the Utah-Idaho Sugar Company, by which said lease, said company will receive before March 2, 1925, the sum of $115,000.00; said rental value thereby fixing a value of the sugar factory and holdings of the company at more than $1,150,000.00, and after paying taxes and other expenses would pay more than 8 per cent on a valuation of $1,150,000.00, which said valuation is a very reasonable valuation for said property; that this Honorable Court by fixing a price of $650,000.00 as a minimum bid to be received, has in effect conveyed to prospective purchasers the idea that said property could be purchased for approximately that sum, all of which is greatly to the disadvantage of the stockholders of the company and of its creditors.

X.

Your petitioner further represents that if said property is sold on the Receiver's sale on the 1st day of March, 1924, that the stockholders and creditors of petitioner will be greatly damaged and injured by said sale, and will be deprived of an opportunity to sell said property at a much higher figure than can be received at a sale on said date; that your petitioner now has negotiations pending looking to the sale of said property with one company at a price aggregating [161] $1,135,000.00, and other parties are negotiating and have heretofore submitted a proposition on the bases of $925,000.00; that your petitioner has conferred with still other people looking to a refund of the company's indebtedness, and now has negotiations pending by which, in the judgment of your petitioner, it should be able to refund, as deemed for the best interest of the company, all of the indebtedness of the company and leave the company in possession of its property as a going concern and with funds sufficient to carry on its business, in which event, in the judgment of your petitioner, the property and business of the company as a going concern is worth to the stockholders at least $1,500,000.00; that if said property is forced to sale at this time, it will hamper and prevent the negotiations now pending looking to a sale of said property or a refund of its indebtedness.

XI.

That if, in the opinion of this Honorable Court, a sale of said property should become necessary in

order to fully protect the creditors and stockholders of the company, that no damage, loss or injury, under any circumstances could be sustained by the postponement of the said sale until to and including the 1st day of July, A. D. 1924; that if a sale is ordered for that time, in event the property is not sold by your petitioner before said date or its indebtedness is not refunded before said time, there will still be six months time within which to sell said property and allow a redemption therefor before the beginning of the 1925 season; that by the postponement of said sale to said date, it will enable your petitioner to carry on successfully the negotiations now pending and upon which it has been earnestly working since the amount of the indebtedness of your petitioner was fixed and determined by the decree of this Court heretofore entered. [162]

XII.

That it is necessary for petitioner, in order to consummate the sale of the property now pending, to call a stockholders meeting and to secure the approval of the stockholders both preferred and common, in order to consummate said deal; that a large number of the stockholders of the company reside in Japan, and it takes approximately thirty days to get communications to them, and to receive a reply; that it is necessary to get necessary, proper and legal notices in order to transact the business necessary to be done in effecting said sale in a proper and legal way and time is required for said purposes; that if said property is now sold at

a forced sale and should bring the amount suggested in the order of the Court, it would then greatly embarrass and entirely prevent your petitioner from selling the property upon a basis that will properly protect the stockholders of the Company; that delay in the time of said sale will greatly benefit your petitioner, stockholders and creditors, and will in no manner embarrass the Receiver.

WHEREFORE, your petitioner prays:

1. That an order of this Court extending the time of the Receiver's sale of said property to and including the 1st day of July, A. D. 1924, and that the Court fix a proper period for redemption thereafter.

2. That the Court immediately order the sale heretofore advertised for 12 o'clock noon, March 1, 1924, postponed.

3. That such other and further order as is meet and equitable in the premises.

MARIONEAUX, KING & SCHULDER,
Attorneys for Beet Growers Sugar Company,
Defendants Herein.

[Duly verified.]

[Endorsed]: U. S. District Court, District of Idaho. Filed Mar. 1, 1924. W. D. McReynolds, Clerk. [163]

[Title of Court and Cause.]

ORDER OF COURT RE POSTPONEMENT OF SALE.

Upon petition of the defendant Beet Growers Sugar Company,

IT IS ORDERED, that unless, in view of his more intimate knowledge of conditions upon the ground he thinks it would be perilous to postpone the sale, the Receiver postpone the sale set for to-day for nineteen (19) days, namely, until Thursday the 20th day of March, 1924, at 12:00 o'clock M., and that he give notice of such postponement by announcement at the place and time of sale to-day, and by further brief notices in the newspapers in which the original notice has been published; and

IT IS FURTHER ORDERED, that a hearing be had in the courtroom at Pocatello, Idaho, at 9:30 on the morning of March 11th, 1924, upon the said defendant's petition for further postponement of said sale, of which hearing the defendant is directed to give all parties of record to the suit notice without unnecessary delay.

Dated: Boise, Idaho, March 1st, 1924.

FRANK S. DIETRICH,
District Judge.

[Endorsed]: U. S. District Court, District of Idaho. Filed Mar. 1, 1924. W. D. McReynolds, Clerk. [164]

[Title of Court and Cause.]

ORDER FIXING TIME FOR HEARING APPLICATION TO APPROVE SALE.

The Receiver having presented his return of sale of beet sugar plant at Rigby, pursuant to orders heretofore made,

IT IS ORDERED, that a hearing upon said return, and the matter of confirming said sale, be set for Friday, March 14th, at 2:00 o'clock P. M., in the courtroom at Pocatello, Idaho.

Dated: Boise, March 4th, 1924.

FRANK S. DIETRICH,
District Judge.

[Endorsed]: U. S. District Court, District of Idaho. Filed Mar. 4, 1924. W. D. McReynolds, Clerk. [165]

[Title of Court and Cause.]

PETITION AND OBJECTIONS FILED BY DEFENDANT BEET GROWERS SUGAR COMPANY TO REPORT OF RECEIVER ASKING CONFIRMATION OF SALE OF PROPERTY.

Now comes the Beet Growers Sugar Company, one of the defendants above named, and hereby respectfully represents to this Honorable Court and petitions as follows:

I.

That heretofore and on or about the 25th day of January, 1924, this Honorable Court entered its order herein, authorizing the Receiver of this petitioner to sell at public sale all of its property, both real, personal and mixed, and principally its beet sugar factory at and near Rigby, Idaho, with all of its appurtenances and all property used in connection therewith, and thereafter on the 7th day of

February, 1924, this Honorable Court filed and entered a supplemental order of sale in respect to said property, and the conditions under which the same shall be sold.

II.

That since the filing of the order of sale on the 25th day of January, 1924, the property of the defendant company, so ordered to be sold, has been by order of this Court leased to the Utah-Idaho Sugar Company, at a fixed rental, for the year [165½] 1924 of $115,000.00, and $25,000.00 of said amount has heretofore been paid by said Utah-Idaho Sugar Company to the Receiver and the balance of said payment has been secured by a good and sufficient surety bond; that it was set forth in the first paragraph of the order authorizing the Receiver's sale; that the net indebtedness of the Receiver will aggregate approximately $67,000.00, it being stated by said order that there are no funds available with which to pay said amount, but your petitioner alleges that by the payment of the $25,000.00 by the Utah-Idaho Sugar Company, said amount of indebtedness has been reduced in the sum of $25,000.00, or to approximately $42,000.00, with $90,000.00 additional to be paid during the year ending March 1, 1925; that said $90,000.00 will pay the taxes for 1923, amounting to $12,810.00, together with the interest, penalties and costs thereon, and will still leave a balance of approximately $75,000.00 with which to pay interest on the secured indebtedness outstanding against this petitioner.

III.

That according to the recital in paragraph 3 of the order authorizing said Receiver's sale, it appears that there is a total of secured indebtedness outstanding in the sum of $337,345.33; that figuring the interest on said amount of secured indebtedness at 7 per cent for the year 1924, it would aggregate the sum of $23,614.17, and deducting this amount from the approximate sum of $75,000.00 above referred to, the Receiver will still have on hand more than $50,000.00 with which to pay Receiver's expenses, other accruing taxes and to apply on the outstanding Receiver's certificates.

IV.

That according to the report of A. V. Scott, Receiver, and E. J. Broberg, special auditor, the unsecured claims approved, less proper deductions, amount to the sum of $147,574.00; that according to said report so filed, the total amount of indebtedness, [166] except Receiver's compensation from January 1, 1924, and legal fees amount to $623,-239.00, of this amount, however, there are unsecured claims not filed, and which claims are questioned by this petitioner in the sum of $6,428.00, and claims filed but not approved in the sum of $13,407.00, liabilities on these claims being denied. These two items amount to $19,435.00, which should be deducted from the report filed by the Receiver and auditor, and deducting said amount it would leave as shown by said report but the sum of $603,404.00 as a total liability of the company. From this amount is now to be deducted. or at least to be

taken into account, the sum of $115,000.00, to be received for rental for the property, and deducting this amount from the total indebtedness would leave at this time approximately the sum of $488,-000.00 indebtedness, to which would have to be added the accruing interest, the balance of the Receiver's charges and attorney's fees, or a total indebtedness under any circumstances of not to exceed $560,000.00 at the end of the rental season.

V.

That if said property belonging to the petitioner be retained in the hands of the Receiver until March 1, 1925, the company would be in a better condition financially than at the present time, and no damage or loss by reason of such delay would occur to said Company or to its creditors.

VI.

That heretofore and on the 1st day of March, 1924, your petitioner filed its petition herein, in which said petition an order was requested extending the time of the receiver's sale to and including the 1st day of July, 1924, and that the court fix a proper period of redemption thereafter, and that the court order that the sale advertised for 12 o'clock noon March 1st, 1924, be postponed, and that the court make such [167] other and further order as is meet and equitable in the premises; that upon the presentation of said petition, this Honorable Court made and entered the following order:

"IT IS ORDERED, that unless, in view of his more intimate knowledge of conditions

upon the ground he thinks it would be perilous to postpone the sale, the receiver postpone the sale set for to-day for nineteen (19) days, namely until Thursday the 20th day of March, 1924, at 12 o'clock M., and that he give notice of such postponement by announcement at the place and time of sale to-day, and by further brief notices in the newspapers in which the original notice has been published; and

IT IS FURTHER ORDERED, that a hearing be had in the courtroom at Pocatello, Idaho, at 9:30 on the morning of March 11th, 1924, upon the said defendant's petition for further postponement of said sale, of which hearing the defendant is directed to give all parties of record to the suit notice without unnecessary delay."

Dated: Boise, Idaho, March 1, 1924.

VII.

That the making and entering of said order was communicated to the receiver herein before the hour of 12 o'clock noon on the 1st day of March, 1924, but as your petitioner is informed and verily believes and therefore states the fact to be, said receiver failed to postpone said sale, and on said date and at the hour fixed therefor, the property so advertised for sale, was by said receiver offered for sale and was bid in by the Utah Idaho Sugar Company, a corporation, for the sum of $800,000.00; and thereafter said receiver presented his return of sale of said property to this Honorable Court,

and on March 4, 1924, the Court made and entered the following order:

> "The receiver having presented his return of sale of the beet sugar plant at Rigby, pursuant to orders heretofore made,
>
> IT IS ORDERED that a hearing upon said return and the matter of confirming said sale be set for Friday, March 14th at 2 o'clock P. M. in the courtroom at Pocatello, Idaho."

VIII.

Your petitioner hereby respectfully objects to the confirmation [168] of said sale, and for the following reasons, to wit:

(a) That at the time this Honorable Court entered its order authorizing the sale of said property, and directed the receiver not to accept a bid therefor for less than $650,000.00 the property of petitioner had not been leased for the 1924 season; that after the ordering of said sale, and on the 6th day of February, 1924, the receiver executed a lease, with the approval of this court, to the Utah Idaho Sugar Company, by which said lease said company will receive before March 2, 1925, the sum of $115,000.00; said rental value thereby fixing the value of the sugar factory and the holdings of the company at more than $1,150,000.00, and after paying taxes and other expenses, will pay more than eight per cent on a valuation of $1,150,000.00, which said valuation is a very reasonable one for said property; that with the sugar factory owned by your petitioner, in full operation, and as a going concern, it is reasonably worth to the stockholders the

sum of $1,500,000.00; that at the time of said sale, to wit, on March 1st, 1924, and at the present time, petitioner has negotiations pending which, in the judgment of your petitioner, would enable it to sell said property for a sum largely in excess of $1,-150,000.00, or to be able to refund all of its outstanding indebtedness, and leave the company in the possession of its property as a going concern and with funds on hand sufficient to carry on its business, in which event the stockholders of your petitioner would be protected in their investment, and greatly benefited thereby.

(b) That the amount of $800,000.00 bid by the Utah Idaho Sugar Company for said property, is an amount far less than the reasonable market value of said property, and a confirmation of said sale and the actual sale of said property for said amount would be greatly to the disadvantage of the stockholders [169] of petitioner and would occasion them serious loss, they, by said action losing approximately ninety per cent of their original investment.

(c) That your petitioner verily believes that the bid received by the Receiver, and in the sum of $800,000.00, should not by this Court be confirmed, but that the court should in the interest of the stockholders of petitioner, authorize and direct the receiver to resell said property at a date not earlier than July 1st, 1924, and to give the necessary and proper notice of said sale; that in the judgment of petitioner a resale of said property would enable petitioner to negotiate the sale of said property

upon a basis greatly to the advantage of the stockholders of petitioner, and would enable them to receive a sum of at least $350,000.00 above the amount bid at the Receiver's sale on March 1st, 1924.

(d) That petitioner now has negotiations pending not only for the sale of the property, but also negotiations looking to a refund of the company's indebtedness, which, if accomplished, will obviate the necessity of a sale of said property, but will leave said property in the hands of said petitioner and under such conditions that its sugar factory could be operated as a going concern, thereby enabling it to protect not only its creditors, but each and all of its stockholders.

(e) That the ordering of a resale of said property and the postponement of the date of said sale to and including July 1, 1924, would in no manner jeopardize the standing of the creditors of the corporation, and would not in any manner impair or diminish the property of the corporation pledged as security for the outstanding bonds of petitioner secured thereby, and the outstanding receiver's certificates, and would not prevent a reasonable period of time for redemption in the [170] event of said property being sold on said date before the beginning of the 1925 beet season campaign.

(f) That by the terms of the order of sale heretofore entered herein, the petitioner is only given the exclusive right to redeem from said sale for a period of three months, and that thereafter, for an additional period of three months, if no redemption

has been made by the company, any organization of preferred stockholders, comprising at least thirty per cent of the outstanding stock may redeem; that by the terms of said order, it is uncertain and indefinite when the period of redemption shall begin to run, the inference from the terms thereof, however, being that the period of redemption will begin to run from the date of the confirmation of said sale, notwithstanding the proposed purchaser would have ninety days thereafter in which to pay for said property, and your petitioner therefore alleges that it would not know and would have no means of knowing whether or not the purchaser would pay the final payments required under its bid, or whether it would endeavor to fully comply with the terms and conditions of said order of sale, thereby leaving your petitioner in a position where its debts have not been fully paid or discharged or the existing mortgage upon said property cancelled, all of which would greatly prejudice and interfere with the refinancing of petitioner and also with the securing of the necessary and proper funds with which to pay its indebtedness, or to redeem said property from said sale; that if this Honorable Court, upon the hearing of this petition should order the aforesaid sale confirmed, then the order of confirmation should provide that your petitioner should have the full period of redemption allowed by law, and after the final payment of the purchase price so bid shall have been made; that any right of redemption ordered by the Court would be of no benefit to petitioner unless said right of redemption

can be exercised after the final payment shall have been made for said property. [171]

IX.

Your petitioner further alleges that under and by virtue of the order of this Court, directing the Receiver to sell the property of petitioner, it was provided that "any competent person or corporation may become the purchaser at such sale"; that your petitioner is informed and verily believes and therefore states the fact to be that the Utah Idaho Sugar Company, a corporation, its officers and agents, were the only bidders at said sale, and that the Receiver sold said property, subject to the confirmation of this Court, to the Utah Idaho Sugar Company. And petitioner further alleges that said Utah Idaho Sugar Company is not a competent corporation, or one having the right to become a bidder or purchaser at said sale, and is not entitled to purchase said property or any part thereof at Receiver's sale; that heretofore a certain action was instituted and commenced by the Federal Trade Commission of the United States of America against the Utah Idaho Sugar Company and other defendants, which said action has docket number 303, said proceedings being under Section 5 of the Act of September 26, 1924, known as the Federal Trade Commission Act and passed by the Congress of the United States. The Federal Trade Commission having issued and served its complaint herein, the Utah Idaho Sugar Company filed its answer in said proceedings, admitting certain of the allegations of said complaint and denying certain others

thereof; that thereafter, hearings were had before said commission, testimony was taken, arguments made, and thereafter, Findings of Fact and Conclusions were duly rendered, made and entered by the said Federal Trade Commission, on the 3d day of October, 1923, and on said date a judgment and restraining order was issued in said proceeding against the Utah Idaho Sugar Company and other defendants therein, by the terms of which said judgment and restraining order, the said Utah Idaho Sugar Company, and [171–a] others, were ordered to forever cease and desist from doing and performing certain acts and things specifically set forth in said judgment, and particularly commanding the said Utah Idaho Sugar Company and the other defendants, to cease and desist from conspiring or combining between and among themselves to maintain certain monopolies and to prevent the establishment of beet sugar enterprises and the building of beet sugar factories by persons and interests other than said corporation respondents, and to cease and desist from hindering, forestalling, obstructing or preventing competitors or prospective competitors from engaging in the purchase of sugar beets and in the manufacture and sale of refined beet sugar in interstate commerce, and from effectuating or attempting to effectuate such conspiracy or combination; and by said judgment and restraining order the said Utah Idaho Sugar Company was commanded to cease and desist from using its financial power and influence for preventing or interfering with the establish-

ment of independent, competing sugar companies or organizations or from doing any act or thing that in any manner would interfere with the proper financing of such organizations or from conducting or operating their business, or from engaging in the beet sugar business; that a copy of said Findings of Fact and Conclusions and judgment and restraining order is hereunto attached and made a part of this petition and marked Exhibit "A"; that by virtue of the terms of said Findings, Conclusions and Judgment, the Utah Idaho Sugar Company is not a competent or proper corporation to bid for the property of your petitioner or to become the purchaser thereof at a forced sale; that the said Utah Idaho Sugar Company has no right, power or authority to under any circumstances purchase said property or to negotiate therefor, without being in violation of the Findings, Conclusions and Judgment hereinbefore [172] referred to, except the same was done by the free and voluntary act of petitioner and its stockholders; that the sale of said property under the order of the Court was a forced sale and against the objection and protest of this petitioner and any confirmation of said sale at this time by this Honorable Court, would be without the consent and against the solemn protest of petitioner and its stockholders.

X.

That it was found and determined by the Federal Trade Commission that petitioner was organized as an independent enterprise for the purpose of

erecting a sugar beet factory, and of engaging in the purchase of sugar beets, and the manufacture and sale of beet sugar in interstate commerce, and that shortly after the incorporation of petitioner, the Utah-Idaho Sugar Company and others undertook to prevent sugar operations of petitioner as an independent concern, and undertook to prevent the erection of its factory by making false, unfair and misleading statements to farmers with whom contracts had been made for the furnishing of beets, and to its stockholders to the effect that the company would not be able to get beet seed to supply to contracting farmers, nor to get the necessary machinery and building material to complete said factory; that petitioner would be financially unable to complete its factory; that the land in the vicinity would not produce sugar beets; that said independent company would not be able to pay for beets under contract; that the promoters of said enterprise were dishonest and that it was a dangerous investment, and that in the spring of 1917 the assistant general manager of the Utah-Idaho Sugar Company wrote to the Anderson Brothers Bank at Rigby, Idaho, intimating that said bank had been working in the interest of the [173] Beet Growers Sugar Company, and indirectly threatening the bank with reprisals if it did not cease supporting the enterprise in which petitioner was engaged, and work in harmony with the Utah-Idaho Sugar Company; that by reason of the Findings and Conclusions reached by the Federal Trade Commission in respect to the actions of the Utah-Idaho Sugar

Company, the order was entered commanding said Utah-Idaho Company to cease and desist from using its financial power and influence so as to cause bankers and others to refuse credit to petitioner and others engaged in the purchase of sugar beets, and the manufacture and sale of refined sugar in interstate commerce, and from inciting financial trouble or embarrassment to petitioner and competitors or prospective competitors, or by purchasing or acquiring secretly the whole or a controlling interest in the business of competitors or prospective competitors who were engaged or intend to engage in the manufacture and sale of refined beet sugar in interstate commerce; that the said Utah-Idaho Sugar Company in now bidding and conditions that the stockholders of petitioner at force sale, is a deliberate attempt upon the part of the said Utah-Idaho Sugar Company to prevent petitioner from engaging in an independent beet sugar manufacturing business in interstate commerce, and an attempt upon the part of said company to acquire said property under such terms and conditions that the stockholders of etitnoner would sustain a loss of approximately ninety per cent of their invested capital, and said acts on the part of the said Utah-Idaho Sugar Company is but the culmination of the plans and purposes of said company to destroy petitioner as an independent competitor, and to put it, as such competitor, out of business; that the sale of said property to the said Utah-Idaho Sugar Company upon the terms above stated, would in effect eliminate all [174]

of the stockholders of petitioner from the beet sugar business in the State of Idaho; and your petitioner therefore alleges that the confirmation of the sale of said beet sugar factory and property to the Utah-Idaho Sugar Company would operate unfairly to petitioner and its stockholders and to their great and irreparable damage and injury, and said confirmation, as your petitioner is informed and verily believes, would be in violation of a judgment and decision of the Federal Trade Commission in the proceedings hereinbefore referred to, and would be in violation of the various acts of Congress of the United States known as Anti-Trust Laws, and particularly in violation of Section 5 of the Act of September 26, 1914, known as the Federal Trade Commission Act.

WHEREFORE, petitioner prays:

1. That an order of this Honorable Court be entered refusing to confirm the sale of the property of the beet sugar plant of petitioner, and such other of its property as was sold by the Receiver on March 1, 1924, and

2. That the Court order the Receiver herein to readvertise said property for sale and to sell the same to a competent and proper purchaser at 12 o'clock noon, on Tuesday, July 1, 1924, and at a minimum price of not less than $1,150,000.00, and

3. That the Court order that the petitioner herein have the right of redemption from said sale of said property, as provided for by the statutes of the State of Idaho in mortgage foreclosure proceedings, and that the period of redemption from

any sale authorized or approved by the Court shall not commence or begin to run until the full purchase price of said property shall have been paid.

MARIONEAUX, KING & SCHULDER,
Attorneys for Beet Growers Sugar Company.
[175]

"Petition duly verified by George E. Sanders, March 13, 1924." [176]

UNITED STATES OF AMERICA.

Before FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the city of Washington, D. C., on the 3d day of October, A. D. 1923. Present: VICTOR MURDOCK, Chairman; JOHN F. NUGENT, HUSTON THOMPSON, VERNON V. VAN FLEET, NELSON B. GASKILL, Commissioners.

DOCKET No. 303.

FEDERAL TRADE COMMISSION

vs.

UTAH–IDAHO SUGAR COMPANY, THE AMALGAMATED SUGAR COMPANY, E. R. WOOLLEY, A. P. COOPER and E. F. CULLEN.

FINDINGS AS TO THE FACTS AND CONCLUSIONS.

The Federal Trade Commission having issued and served its complaint herein, upon the respond-

ent, Utah-Idaho Sugar Company, The Amalgamated Sugar Company, E. R. Woolley and A. P. Cooper, the respondent E. F. Cullen not being served, wherein it is alleged that it had reason to believe that said respondents have been and now are using unfair methods of competition in interstate commerce in violation of the provisions of the Act of Congress approved September 26th, 1914, entitled, "An Act To Create a Federal Trade Commission to define its powers and duties, and for other purposes," and that a proceedings by it in respect thereof would be to the interest of the public, and fully stating its charges in this respect, and the respondents having entered their appearance by their respective attorneys, and having filed their answers admitting certain of the allegations of said complaint and denying certain others thereof, and the commission having introduced testimony and evidence in support of the charges in said complaint, and the respondents having introduced testimony and evidence in opposition thereto, and counsel for the Commission, Utah-Idaho Sugar Company, The Amalgamated Sugar Company and E. R. Woolley, having filed briefs as to the law and facts in said proceeding, and the commission having heard the argument of the respective counsel on the merits of the case, except that The Amalgamated Sugar Company and E. R. Woolley through their counsel rested their case on their brief and having duly considered the record and being fully advised in the premises, now makes this its report in writing, stating its findings as to the facts and conclusions as follows:

FINDINGS AS TO THE FACTS.

Respondent, Utah-Idaho Sugar Company, is a corporation organized under the laws of the State of Utah in the year 1907, with its principal place of business in the city of Salt Lake in said state. It was organized for the purpose of consolidating, and did consolidate, into a single corporation a number of theretofore separate competing corporations all engaged in the purchase of sugar beets and the manufacture and sale of sugar beets and other products of the sugar beet in various states of the United States. The companies thus consolidated and merged into said Utah-Idaho Sugar Company were as follows: [177]

(1) The Utah Sugar Company incorporated in the year 1890, with its principal place of business and a factory for the manufacture of beet sugar at the city of Lemhi, Utah, with a beet slicing capacity of about 1,000 tons per day. (A ton of beets will make anywhere from 150 to 275 pounds of sugar, dependent upon soil and seasonal conditions.)

(2) The Idaho Sugar Company incorporated in the year 1903, with its principal place of business and factory for the manufacture of beet sugar at the city of Idaho Falls in the State of Idaho, with a beet slicing capacity of 900 tons per day. In the year 1905 this company acquired the Fremont Sugar Company, which had its principal place of business and a factory for the

manufacture of beet sugar at the town of Sugar City in the State of Idaho, with a beet slicing capacity of 900 tons per day.

(3) The Western Idaho Sugar Company incorporated in the year 1905 with its principal place of business and a factory for the manufacture of beet sugar at the city of Nampa, State of Idaho, with a beet slicing capacity of 800 tons per day.

After the creation of the Utah-Idaho Sugar Company in the year 1907, as above set out, that company has built or acquired the following additional factories.

(1) A factory at the town of Elzinore, Utah, built in 1911, with a beet slicing capacity of 300 tons per day.

(2) A factory at the town of Payson, Utah, built in 1913, with a beet slicing capacity of 650 tons per day.

(3) A factory at the town of West Jordan, Utah, built in 1916, with a beet slicing capacity of 650 tons per day.

(4) A factory at the town of Yakima, State of Washington, built in 1917, with a beet slicing capacity of 650 tons per day.

(5) A factory at the town of Brigham City, Utah, built in 1916, with a beet slicing capacity of 650 tons per day.

(6) A factory at the town of Toppenish, Washington, built in 1917, with a beet slicing capacity of 750 tons per day.

(7) A factory at the town of Sunnyside, Washington, moved from Grants Pass, Oregon,

in 1919, with a beet slicing capacity of 650 tons per day.

(8) A factory at the town of Delta, Utah, built in 1920, with a beet slicing capacity of about 700 tons per day.

(9) A factory at Spanish Fork, Utah, removed thither from Nampa, Idaho, in 1916. The beet slicing capacity of the factory is 800 tons per day.

Respondent, The Amalgamated Sugar Company, is a corporation organized in the year of 1902, under the laws of the State of Utah, with its principal place of business in the city of Ogden, in said state. It was organized for the purpose of consolidating, and did consolidate, into a single corporation two separate competing corporations engaged in the purchase of sugar beets and the manufacture of and sale of beet sugar and other products of the sugar beet in various states of the United States. The companies thus consolidated with and merged into The Amalgamated Sugar Company were as follows: [178]

(1) The Ogden Sugar Company, incorporated in the year 1898 with its principal place of business and a factory for the manufacture of beet sugar in the city of Ogden, Utah, with a beet slicing capacity of 900 tons per day.

(2) The Logan Sugar Company, incorporated in the year 1901, with its principal place of business and a factory for the manufacture of beet sugar in the town of Logan,

Utah, with a beet slicing capacity of 650 tons per day.

(3) This respondent in the year 1912 erected a further factory near the town of Burley, Idaho, with a beet slicing capacity of 600 tons per day.

By reincorporation under the name "The Amalgamated Sugar Company" in the year 1915, this respondent absorbed and consolidated with the two companies above mentioned.

(4) Lewiston Sugar Company, a corporation organized in 1903, with its principal place of business and a factory in the town of Lewiston, Utah. At the time of such consolidation the beet slicing capacity of its said factory was 800 tons per day.

Since said reorganization, this respondent has erected or acquired the following additional beet sugar factories:

(5) A factory located near the town of Twin Falls, Idaho, erected in 1916, with the beet slicing capacity of about 800 tons per day.

(6) A factory at Paul, in the State of Idaho, erected in the year 1917, with a beet slicing capacity of about 650 tons per day.

(7) A factory located near the town of Smithfield, Utah, erected in the year 1917, with a beet slicing capacity of about 700 tons per day.

The factories of the corporate respondents, the dates of their acquisition and their geographic loca-

tion are more fully described in the attached map, which is used for the purpose of illustration only, and is made a part of the findings, but it is not an exhibit in the proceeding.

From the time of their acquisition or erection, said respondents have continuously operated and still operate the foregoing factories in the manufacture of beet sugar and other products, such as sugar molasses, derived from the sugar beet in competition with other individuals, partnerships and corporations similarly engaged, and have continuously sold said commodities to purchasers in various states of the United States. (The molasses is shipped to points where said corporation maintains special equipment in connection with a few of their factories, for the purpose of manufacturing said molasses into refined beet sugar.) Refined beet sugar is the product principally so sold and references to said product will hereinafter be limited thereto. Respondents ship said beet sugar, when so sold from their said several manufacturing factories to said purchasers at points in states other than the state of said manufacture, in competition with other individuals, partnerships and corporations similarly engaged in the production and/or sale of beet and cane sugar in interstate commerce. [179]

The sugar beets from which respondents manufacture the aforesaid product are secured from farmers so far as possible in territory adjacent, in each instance, to aforesaid factories. From time to time, however, and as considerations of convenience and other circumstances render the same

desirable or necessary, respondents purchase and ship sugar beets from territory not so contiguous, and in many instances, in a state or states other than that in which is located the factory at which said beets are to be converted into sugar. In such instances they ship the sugar beets thus secured from points in the state where purchased to such factory located in such other state.

For many years it has been the practice of these respondents to annually, in advance of the growing season to send agents, by them denominated field men and agricultural superintendents, among the farmers in the States of Utah, Idaho, Oregon, Nevada and Washington, for the purpose of entering with said farmers into contracts whereby the farmers undertake to grow sugar beets for said respondents under the supervision, in consideration of certain prices to be paid by respondents partly before and partly after the same are manufactured into sugar. With few exceptions, all the sugar beets procured by said respondents for conversion in their factories, as heretofore set out, have been and are purchased in the performance of said contracts. For many years, and as a regularly recurring annual practice, said respondents have secured, and still secure, many thousands of tons of sugar beets in the manner above set out, which beets have been and are, converted into sugar at said factories, and said product regularly has been, and is, in the ordinary course of business, shipped and sold by said respondents in interstate commerce. There has thus existed for many years, and still exists, a regular flow or current of inter-

state commerce in sugar beets and beet sugar, beginning with the contracts for and production of said sugar beets, which are sent from the states, in many instances, where the same are produced, with the expectation that they will end their transit in the form of beet sugar after the purchase of that commodity in other states, which current of commerce includes all cases where purchases of beets are made by respondents for shipment to another state or for conversion within the state where purchased and the shipment outside of the state of the beet sugar resulting from such conversion.

There has been since the formation of the companies afterward merged into the Utah-Idaho and The Amalgamated Companies, as hereinbefore set out (hereinafter referred to as predecessor companies) and continuously has been, a close and intimate relation between the prominent stockholders, directors and officers of the predecessor and of the consolidated companies. Joseph F. Smith was president of the Utah Sugar Company, the Idaho Sugar Company, the Fremont Sugar Company, and the Western Idaho Sugar Company, while Horace G. Whitney was at the same time secretary of each of said companies. Upon the organization of the respondent, Utah-Idaho Sugar Company, Joseph F. Smith became president and Horace G. Whitney became secretary-treasurer of that company. Joseph F. Smith likewise became president of respondent, The Amalgamated Company, upon its incorporation in 1902, and continued in that capacity until the year 1915, when he was

succeeded by Anton Lund, a heavy stockholder in both the Utah-Idaho and The Amalgamated Companies. Thomas R. Cutler was general manager of the predecessor companies later merged into the Utah-Idaho Company, was for some time thereafter general manager of that company, and was a director of The Amalgamated Company at the time of its organization in 1902. William H. Wattis in 1914, was president of respondent The Amalgamated Company, and was a member of its board of directors in 1915, 1916 and 1917. In the last named year he became a director of the Utah-Idaho Sugar Company and was placed upon its executive committee. In 1919, he was a prominent stockholder in The Amalgamated Company and in 1920, a heavy stockholder in the Utah-Idaho Company. Of the last named company he became general manager in 1921, and had been connected with that company in one capacity or another for a great many years. Charles W. Nibley was connected officially with The Amalgamated Sugar Company from the time of its original corporation until the absorption of the Lewiston Company in 1916. In 1915, he was a director of the Utah-Idaho Company, and in 1917, became its general manager. L. R. Eccles was vice-president of the Lewiston Company at the time of its consolidation with [180] The Amalgamated Sugar Company in 1915, and in that and the following year was a director of the Utah-Idaho Company, in which capacity he was succeeded by his brother D. C. Eccles in 1917. L. R. Eccles was also vice-president, general manager and director of The Amalgamated Company

from 1915 to September of 1918. D. C. Eccles was a director of the Utah-Idaho Company in 1916 and 1917, and a director of The Amalgamated Company in 1915 and 1916. Joseph Geohegan was a director of the Utah-Idaho Company at the time of its organization and his company the Geohegan Brokerage Company, was joint sales agent for The Amalgamated and the Utah-Idaho Companies up to the year 1916, when he died. Besides these more prominent and influential persons, there were a number of others who from time to time were stockholders, directors, administrative or other officials and employees of both The Amalgamated and the Utah-Idaho Companies, being frequently attached in some capacity to both these respondents at the same time.

At an early period a mutual understanding and intention was manifested between respondents, Utah-Idaho and Amalgamated Companies (hereinafter referred to as corporate respondents), to absorb and retain for themselves to gradually expanding beet sugar industry beginning in the State of Utah and spreading thence to the States of Idaho, Washington, Oregon, Nevada and Montana. H. O. Havemeyer, president of the American Sugar Refining Company, was a large stockholder in corporate respondents. He became identified with their interests some time prior to the year 1902, and was active in giving assistance and advice in the matter of absorbing and retaining said industry and of keeping independent enterprises (X) out of the field, as hereinafter referred to. Corporate respondents reported to him the efforts of inde-

pendent enterprises to invade the field and what efforts were being made to suppress or absorb them and in turn he advised and ordered what steps should be taken in that behalf. He was uniformly offered the opportunity to participate in stock purchases when independent enterprises were acquired or controlled in that manner. At his death his son Horace Havemeyer, as administrator, succeeded him in the management of his interests in corporate respondents and their stock controlled companies.

In the year 1903 the predecessor companies of corporate respondents held a joint meeting of their board of directors, presided over by Joseph F. Smith. The purpose of the meeting was to eliminate an independent beet sugar company which proposed to erect a factory at Lewiston, Utah, for the avowed reason that "the proposed factory would be a menace to the existing companies." The Lewiston Company was afterward absorbed by the respondent The Amalgamated Company, as hereinbefore set out.

In the year 1905 the predecessor companies of respondent Utah-Idaho Company forestalled and prevented one Boutell and one Hoover from financing and establishing an independent enterprise near Payette in Southwest Idaho or Arcadia, Oregon. This was done through Thomas R. Cutler, manager of said predecessor companies, by promising to erect a factory near Payette and using influence to persuade the farmers of the vicinity to enter into beet contracts with said predecessor companies. H. O. Havemeyer instructed said Cutler

to buy a factory site in the same town Boutell and Hoover decided to locate and to do the same with regard to any independent enterprise seeking to enter the states wherein said predecessor companies were operating. Said Cutler used certain influence at his command to stop the operations of Messrs. Boutell and Hoover, both near Payette and at other points, notably at Boise, Idaho. As a result of aforesaid things done by said predecessor companies, all efforts of said Boutell and Hoover to establish an independent enterprise in the State of Idaho were frustrated and notably at the towns of Payette, Boise and Nampa, and thus the establishment of said independent enterprise at either place and the potential competition thereof with corporate respondents was forestalled and prevented.

By the year 1905 the predecessor companies of the Utah-Idaho Company bought sufficient stock to control the Snake River Valley Company, an independent enterprise then competing with the predecessor companies of corporate respondents, which owned and was operating a beet sugar factory at Blackfoot, Idaho. This was the result of efforts in that behalf begun by the predecessor —— [181]

(X) The words "independent enterprise" are used throughout these findings to designate enterprises other than, and competing with or potential competitors of, the Utah-Idaho and The Amalgamated Sugar Companies.

companies of respondent Utah-Idaho Company, through aforesaid Cutler as early as the year 1905, when he began buying up stock in said independent

enterprise. He wrote H. O. Havemeyer that he was anxious to obtain control of said independent enterprise for said predecessor companies and that they were determined to get said independent enterprise into their hands. Said independent enterprise was later absorbed by said predecessors as above set out, thereby eliminating the competition which had theretofore existed between said independent enterprise and the predecessor companies of corporate respondents.

The Layton Sugar Company was incorporated in the year 1915 for the purpose of erecting a beet sugar factory at the town of Layton, Utah, and engaging in the business of purchasing sugar beets and of manufacturing and selling beet sugar in interstate commerce. Upon its organization and by agreement such corporate respondent invested $100,000.00 in the stock of said company, and these holdings together with the holdings of others closely identified in other interests with corporate respondents, put into the hands of the said respondents the control of the operation of the Layton Sugar Company with the effect of preventing any competition between that company and corporate respondents.

In the year 1909 the corporate respondents agreed upon an interstate territorial division of the beet producing territory in which boundary lines were established defining the territory in which The Amalgamated Company should have the sole right to operate without invasion by the Utah-Idaho Company, and *vice versa*. This agreement continued to the year 1916 when it was superseded

by a similar agreement rearranging such boundary lines and territory.

By the year 1916 corporate respondents together (but not in the sense of joint ownership) owned or controlled all the beet sugar factories in the States of Utah, Idaho, Nevada, Oregon and Washington, including factories built by themselves and the factories of independent enterprises which they have acquired, wholly or partly, through obstructive, coercive and unfair methods as herein set out, and in connection with such building and acquisition had prevented the entry of other proposed independent enterprises into the field by means of similar obstructive and suppressive measures. As a result said respondents were sometime prior and up to the year 1916, enjoying a practical if not an entire monopoly of the beet sugar industry in the States above mentioned.

At this time each respondent was possessed of monies, assets and properties of the value of many million dollars. The Utah-Idaho Sugar Company was originally capitalized at $13,000,000, which was increased to $30,000,000 in May, 1917. The properties and assets of the three predecessor companies merged in the Utah-Idaho Company at the time of said merger were of the total value of over $11,000,000. The Amalgamated Sugar Company was capitalized at $25,000,000 which after two increases were finally fixed at $30,000,000. At the time the conspiracy hereinafter set out was entered into, the corporate respondents were enjoying a very large and lucrative business, as is shown by the

following table of the combined total sales of the beet sugar by said respondents in interstate and intrastate commerce during the years indicated.

	Total Sales	Interstate Distribution
1916	2,644,949—100 lb. bags	2,250,820—100 lb. bags
1917	2,824,557 " " "	2,342,586 " " "
1918	2,458,678 " " "	1,901,205 " " "
1919	2,565,870 " " "	1,895,017 " " "

[182]

The general management and control of all the aforesaid business and activities of corporate respondents were and are exercised by them from their principal offices in the Cities of Salt Lake and Ogden, Utah, respectively, from which points they control the procuring and handling of sugar beets from field to the factory, the operations of said factories, the diversion of beets from one to the other, the extension and development of the beet growing industry, the location and erection of new factories, and the closing down and removal of factories, from one place to another from time to time, and in divers instances across State lines, all in a manner to consolidate and unify their large operations, and to best prevent or hinder the competition of independent enterprises entering or desiring to enter into said industry in aforesaid States in which respondents operate, and thus so secure and retain to said respondents aforesaid monopoly of the beet sugar industry in said territory.

In about the year 1915, respondents, Utah-Idaho

Sugar Company, The Amalgamated Sugar Company, E. R. Woolley, A. P. Cooper, and E. F. Cullen, secretly agreed, conspired and confederated with each other to maintain and retain the aforesaid monopoly of corporate respondents, to prevent the establishment of beet sugar enterprises and the building of sugar factories by persons of interests other than respondents, The Amalgamated Sugar Company and the Utah-Idaho Sugar Company, and to suppress all competition in the manufacture, sale and distribution of beet sugar in the States of Utah, Idaho, Nevada, Oregon and Washington, and in the sale in interstate commerce of refined beet sugar produced in those States. At the time of the issuance of the complaint herein and the filing of their answer to the same, respondents E. R. Woolley and A. P. Cooper were residents of Salt Lake City in the State of Utah. Respondents E. F. Cullen was not served with the complaint, and will not be considered further as a respondent in these proceedings. The acts and things done by the said Cullen, however, in so far as they throw light upon the acts and things done by the other respondents herein, are hereinafter referred to.

Pursuant to, and to effect the objects of aforesaid secret agreement, conspiracy and confederation and to accomplish the purpose thereof, respondents did the following acts and things:

(a) In the fall of 1915 and the spring of 1916, one John A. Hendrickson, a resident of Logan, Utah, promoted with the assistance of others an independent enterprise with the intention of erect-

ing a beet sugar factory near the town of Smithfield, in said County and State, with the purpose and intention of engaging in the manufacture of beet sugar and the sale of that product in interstate commerce. The town of Smithfield and its vicinity lay in the territory allocated to The Amalgamated Sugar Company under the division interstate territory between the two corporate respondents, heretofore referred to and provided for in a certain contract, being Exhibit 51, which is hereby referred to and made a part of this finding. This independent enterprise secured an option upon a factory site and a large number of beet contracts with the farmers in the vicinity of said site, and, further, had the financing of the new enterprise well under way through stock subscriptions secured from farmers and business men in the vicinity of Smithfield and from other persons of financial responsibility in the State of Utah and elsewhere. When the corporate respondents learned that said independent enterprise was thus progressing, they called and held in the vicinity of the proposed independent factory meetings of aforesaid stock subscribers in said enterprise and farmers under contract to grow sugar beets for it. The purpose of said meeting was to discourage and dissuade said financial backers and farmers from further supporting said enterprise. Joseph Scowcroft, Director and Vice-president of the respondent, The Amalgamated Company, Merrill Nibley, who became assistant General Manager of the respondent, Utah-Idaho Company in 1916, Fred Taylor, Secre-

tary and Treasurer of the respondent, The Amalgamated Company and L. R. Eccles, a Director of the Utah-Idaho Company, [183] attended said meetings and made statements to the effect that the independent enterprise was financially unsound, would not succeed, was unethically invading territory which belonged to The Amalgamated Company and that that company would itself build a factory near Smithfield in the immediate future. Shortly after said meetings held in the spring of 1916, the respondent, The Amalgamated Company purchased a site in close proximity to the site of the independent factory and started breaking ground as an apparent first step toward building a factory, but without the intention to so build, and in fact said factory was not built.

Said Hendrickson entered into a preliminary agreement with the Dyer Company for the erection of the independent factory. The Dyer Company is a corporation organized under the laws of the State of Ohio, with its principal office in the city of Cleveland in said State. It is, and for many years prior to 1916, had been engaged in the manufacture of machinery for the production of beet sugar, and in the building and equipping of beet sugar factories in many portions of the United States, and was the largest of such manufacturers and builders. Up to the time these proceedings were commenced the Dyer Company had built and equipped thirteen factories for respondent, Utah-Idaho Company, and four factories for the respondent, The Amalgamated Company. Upon learning that said agree-

ment had been entered into, Charles W. Nibley, then a director of respondent, Utah-Idaho Company, telegraphed the Dyer Company at Cleveland, Ohio, protesting against the erection of said independent factory, and as a result of said protest the Dyer Company withdrew from said preliminary agreement.

As a result of the aforesaid things, the financial backers and farmers who had contracted to grow beets for said independent enterprise were discouraged from continuing their support of the same, were induced to break their contracts and withdraw their undertakings of financial support, all of which resulted in the abandonment of said enterprise by said Hendrickson and his associates, and thus the establishment thereof and the potential competition between the same and corporate respondents in and about the purchase of beets and the manufacture and sale of beet sugar in interstate commerce was forestalled and defeated.

(b) In December, 1916, the West Cache Sugar Company, an independent enterprise, was incorporated under the laws of the State of Utah, by aforesaid Hendrickson, one Lorenzo H. Stohl, and others for the purpose of erecting a beet sugar factory in Cache Valley or West Cache Valley in said State, and to purchase sugar beets and manufacture and sell beet sugar in interstate commerce. Said Hendrickson and Stohl were the promoters of said enterprise and became stockholders in this corporation. Hendrickson further became President, Treasurer and a Director in said Company upon its

incorporation. Upon learning that said projected enterprise was under way, with the purpose intent and object of maintaining their agreement, as referred to in Exhibit 51, to the exclusion of competitors, respondents The Amalgamated Sugar Company and Utah-Idaho Sugar Comapny, through their various officers and agents, sought to discourage and prevent the establishment of said enterprise by threats uttered to said incorporators to the effect that these respondents would not permit any independent factory to be erected in said Cache Valley, that if the same should be erected, these respondents would force the price of sugar beets up to $7.00 per ton (the prevailing price being then $5.50); that said enterprise was an invasion of Amalgamated territory, and that if the West Cache Sugar Company succeeded in erecting a factory and entering into business said respondent, The Amalgamated Sugar Company, would "make it so hot" for said company that its promoters would wish that they *would* never started the undertaking. The West Cache Company succeeded in erecting its factory and engaged in the years 1918 and 1919 in the purchase of sugar beets and the manufacture and sale of beet sugar in interstate commerce in competition with corporate respondents, whereupon respondents, The Amalgamated Sugar Company, financed and furnished funds to respondent Woolley, and through him bought up the stock control of the West Cache Company, and through the power thus secured, procured the discharge of said Hendrickson as an officer of said [184] company,

whereby respondents secured complete control of the management of said company and of its factory for the purpose of eliminating, and did eliminate, said company as a competitor. In order to discredit said Hendrickson and Stohl and thus destroy the influence they had exerted in the management of said independent enterprise as the successful promoters thereof, a vexatious and groundless lawsuit was instituted by respondent Woolley under the secret and undisclosed instructions of respondent The Amalgamated Company, against said Hendrickson and Stohl charging them with fraudulent conversion of funds belonging to the West Cache Sugar Company. Said suit was afterward dismissed on its merits by a contract between said Hendrickson and Stohl on the one part and numerous parties including the respondent The Amalgamated Company on the other part. Pursuant to one of the terms of the said contract, said Hendrickson and Stohl sold and delivered to respondent, The Amalgamated Company, and its associates in said contract, all their stock in the West Cache Sugar Company. Said contract further provided that Hendrickson and Stohl should destroy by burning, certain evidence of unfair and illegal practices used by respondent Woolley and his associates in securing control of said independent. Hendrickson and Stohl carried out said provision by burning said evidence.

(c) The Beet Growers' Sugar Company, an independent enterprise, was incorporated in May, 1917, under the laws of the State of Idaho, for the

purpose of erecting a beet sugar factory near the town of Rigby, Idaho, and of engaging in the purchase of sugar beets and the manufacture and sale of beet sugar in interstate commerce. Shortly after said incorporation and while said factory was in course of construction, respondents Utah-Idaho Company, Woolley, Cooper and Cullen, during the years 1917 and 1918, undertook to prevent the successful operation of said independent, and the erection of its factory by making false, unfair and misleading statements to farmers under contract to supply beets to said independent factory and to farmers with whom such contracts were or would be made, and to stockholders of said independent company to the effect that the company would not be able to get beet seed to supply to contracting farmers nor to get the necessary machinery and building materials to complete said factory; that it would be financially unable to complete its factory; that the land in the vicinity of said factory would not produce sugar beets; that said independent company would not be able to pay for beets under contract; that the promoters of said enterprise were dishonest and that it was a dangerous investment. At this time respondents Cooper and Cullen were in the employ of said Beet Growers' Sugar Company as Consulting Engineer in charge of construction, and Bookkeepers, respectively. Said Cooper and Cullen sought to embarrass the Beet Growers' Company and to throw it into the hands of a Receiver by going about in the States of Utah, and Idaho among its creditors, stockholders and those inter-

ested in the success of said enterprise and making false and misleading statements concerning said company to the effect that it was insolvent and that due to mismanagement it would not succeed. Respondents Cooper, Cullen and Woolley further sought to induce prospective investors not to purchase stock in, or otherwise finance the Beet Growers' Company, by making to said prospective purchasers similar false and misleading statements. Said Cooper and Cullen further made false and misleading statements to sundry employees of the Beet Growers Sugar Company and others interested in its success, which statements were derogatory of the standing and reliability of the officers of said company, and statements to the effect that the financial condition of said company was bad and that said company was going into the hands of a Receiver. Respondent Woolley employed at Salt Lake City, Utah, David A. West and Ezra Ricks as secret and undisclosed agents to acquire stock in the Beet Growers Company for the purpose of bringing a stockholder's action to secure the appointment of a Receiver for said company in the State of Idaho, which said suit was brought by said Ricks upon the alleged ground of dishonesty and mismanagement of said company's officers. Said charges, made the basis of said suit, were false and said suit was afterwards dismissed. Because of their aforesaid conduct, respondents Cooper and Cullen were discharged by the Beet Growers' Company, and thereafter they visited points in Utah, and Idaho, making to stockholders and creditors of

said company similar false and misleading statements, all in the attempt to throw said company into the hands of a Receiver and eliminate it as a competitor of corporate respondents. [185]

In the spring of 1917, Merrill Nibley, Assistant General Manager of respondent Utah-Idaho Company, wrote to the Anderson Brothers Bank at Rigby, Idaho, intimating that said bank had been working in the interest of the Beet Growers Sugar Company, and indirectly threatening the bank with reprisals if it did not cease supporting said independent enterprise and work in harmony with the Utah-Idaho Company.

(d) The Oregon-Utah Sugar Company, an independent enterprise was incorporated in September, 1915, under the laws of the State of Utah, for the purpose of erecting a beet sugar factory at the town of Grants Pass, Oregon, and of engaging in the purchase of sugar beets and the manufacture and sale of beet sugar in interstate commerce. Charles W. Nibley, at that time a Director in both the Utah-Idaho and The Amalgamated Companies, assisted in the organization of said independent enterprise and in the financing thereof. As part of said financing said Nibley undertook to procure loans up to the amount of $400,000 to defray operating expenses; the said Nibley from time to time and during the construction of said factory kept the respondent Utah-Idaho Company fully informed as to the progress then being made by the said Oregon-Utah Sugar Company and at no time was it the intention of the said respondent to permit said com-

pany to operate and compete with either it or The Amalgamated Sugar Company in the sale and distribution of beet sugar in interstate commerce. When the independent factory was almost completed and its operation an assured success, said Nibley withheld said financial support, and used his influence to force said independent enterprise to sell its said factory, property and other assets to said Utah-Idaho Company, which result was accomplished, thereby eliminating competition between said independent enterprise and the Utah-Idaho Company in the purchase of sugar beets and in the manufacture and sale of beet sugar in interstate commerce.

(e) In the years 1915 and 1916, one Colonel Mundy and others were promoting and endeavoring to establish an independent beet sugar enterprise in Southern Oregon, and to that end had obtained options for the purchase of 16,000 acres of land upon which to grow sugar beets. $15,000 had been paid on said options. Mundy began negotiations to purchase an existing factory located at Fallon, Nevada, and belonging to the Nevada-Utah Sugar Company, with the intention of moving and re-erecting said factory upon the site finally chosen for his own enterprise. Upon learning of the progress of said independent enterprise, respondent Utah-Idaho Company sent certain of its agents from Salt Lake City, Utah, into Oregon and especially the southern part of that State wherein said Mundy and his associates were operating, said agents being sent for the purpose of obtaining, and they did obtain, in-

formation as to the source or sources from which said enterprise intended to procure beet seed, which at that time, because of the war conditions, was exceedingly scarce and hard to obtain. Upon securing such information, said respondent secretly, through respondent The Amalgamated Company, negotiated for said seed in such a manner as to make it impossible for said independent enterprise to obtain same. The agents sent into Oregon, as aforesaid, further sought to discourage farmers and other persons interested, from growing beets for said independent enterprise and otherwise contracting with it, by statements to the effect that said independent enterprise had no beet seed and could not get any, and that their principal had bought up all the seed in the country, which statement was at that time untrue. Respondent Utah-Idaho Company through C. W. Nibley acquired 51% of the stock of the Nevada-Utah Sugar Company, which was not operating its factory, in order to prevent, and thus did prevent said Mundy and associates from securing the factory of said Nevada-Utah Company. As a result of aforesaid things done by respondent Utah-Idaho Company, the establishment of said independent enterprise by said Mundy and his associates was forestalled, and the potential competition between the same and corporate respondents in and about the purchase of sugar beets and the manufacture and sale of beet sugar in interstate commerce was forestalled and prevented. [186]

(f) The Montana-Utah Sugar Company, an independent enterprise, was incorporated in July, 1916, under the laws of the State of Montana for the purpose of building a beet sugar factory near the town of Hamilton in said State, and to engage in the business of purchasing sugar beets and the manufacture and sale of beet sugar in interstate commerce. Said independent enterprise negotiated with the Dyer Company for the construction of the factory up to the point where a price therefor had been fixed, when the Dyer Company refused to proceed on the ground that it would interfere with that company's two best customers, meaning corporate respondents. The Montana-Utah Sugar Company then let the contract for the building of its factory to another company, and said factory was about one-fourth completed, involving an expenditure, including payments on machinery of about $350,000. Respondent Utah-Idaho Company about this time began to make and publish through agents and otherwise in Montana and in the district of Hamilton in said State, disparaging untrue and misleading statements concerning the promoters and others interested in said enterprise, advised investors and prospective investors in said independent enterprise that the purchase of its stock was a bad investment, and otherwise prejudiced the financing of said independent enterprise with the result that subscriptions to its stock were cancelled and other financial support was withheld, as a result whereof said independent enterprise went into the hands of a Receiver. Thereafter, said enterprise was turned

over to respondent Woolley upon his undertaking to reorganize and finance the same, and while in said respondent's hands and control was adjudged a bankrupt. Through the instrumentality of respondent Woolley the assets and other properties of said independent enterprise were sold to the Great Western Sugar Company. Said independent factory was not completed and potential competition between said independent enterprise and the corporate respondents in and about the purchase of sugar beets and the manufacture and sale of beet sugar in interstate commerce were thus forestalled and prevented.

(g) The Gunnison Valley Sugar Company, an independent enterprise, was incorporated in 1917, under the laws of Utah, for the purpose of building a beet sugar factory at the town of Gunnison, in said State, and to engage in the purchase of sugar beets and the manufacture and sale of beet sugar in interstate commerce. The site chosen was within the territory allocated to the Utah-Idaho Company under the agreement whereby that company and The Amalgamated Company divided territory as hereinbefore set out. On learning of the activities of this independent, respondent Utah-Idaho Company sought to prevent the erection of said independent factory and the success of the Gunnison Valley Company by making, through various agents, false and misleading statements tending to discourage the purchase of stock in said independent, to obstruct the financing thereof and to discourage farmers in the vicinity from growing beets or

contracting to grow beets for said independent enterprise. Said false and misleading statements were to the effect that the purchase of stock in said independent enterprise was a bad investment; that the machinery going into its factory was second-hand, corroded, worthless and would never make sugar; that said independent enterprise could not secure sufficient beet seed; that the land contiguous and naturally tributary to the site of said factory would not raise beets. Further said respondent made attacks upon the character of promoters and other persons prominent in the financing and operation of said independent enterprise. Respondent Utah-Idaho Company further sought to prevent said independent enterprise from procuring supplies of sugar beets by seeking to induce one Royal M. Barney and others to break the contracts into which they had entered for the growing of sugar beets for said independent enterprise, and soliciting said Barney and others to act as its agent in persuading other beet growers to break their similar contracts with said independent enterprise, which at that time was an actual competitor of said respondent in the purchase of sugar beets and the manufacture and sale of beet sugar in interstate commerce. [187]

* * * Company negotiated with Dyer Company to build its said factory, whereupon,

(h) The Springville-Mapleton Sugar Company, an independent enterprise was incorporated in June, 1917, under the laws of the State of Utah, for the purpose of erecting a beet sugar factory near the

towns of Springville and Mapleton, in said State, and of engaging in the business of purchasing sugar beets and the manufacture and sale of beet sugar in interstate commerce. Said * * * respondent Utah-Idaho Company endeavored to prevent the Dyer Company from contracting for and erecting said factory through correspondence with the officials of the Dyer Company indirectly requesting that such construction be not undertaken. The effort failed and the Dyer Company contracted with said independent enterprise to build its said factory, and did, subsequently build the same. Having failed in this, respondent Utah-Idaho Company endeavored to induce the Priority Committee of the United States Government to refuse permits for the shipment of building materials and machinery into the State of Utah necessary to the construction of the independent factory. The means used to accomplish this purpose were:

1. A letter written by Merrill Nibley, Assistant General Manager of the Utah-Idaho Company, to said Priority Committee, under date of October 1, 1917, in which letter misleading statements were made to the effect that the territory in question was already fully served by existing factories; that said factories had never been able to obtain their full requirements of beets from said district; that the proposed independent factory was not necessary and would not increase the food supply, and that the erection of said factory would draw heavily on the resources and labor of the country.

2. Mark Austin, at that time General Agricultural Superintendent of respondent Utah-Idaho Company, dictated and caused to be written a letter to said Priority Committee, containing similar untrue and misleading statements, and in addition containing some purported facts showing that the Utah-Idaho Company completely served the district in question and served it well, both with regard to the farmers' interests and the amount of sugar produced in said district. Said letter further stated that the farmers in that section considered the establishment of a new factory a serious mistake, and that in justice to the farmers it should not be done. Said letter further purported to be written by a farmer and beet growers of the section, who had the welfare of the farmer and the general industry at heart and was speaking from patriotic and disinterested motives. This letter said Austin caused one J. Wm. Johnson, an employee of the Utah-Idaho Company, to sign, and said letter was forwarded to said Priority Committee as a disinterested statement and expression of opinion of the said Johnson as a citizen of said district, reflecting the opinion of the citizens thereof. Said letter in no wise disclosed its real authorship, or that the purported writer thereof had any connection with, or in any manner spoke for the Utah-Idaho Company.

3. Fred G. Taylor, formerly Secretary of the Lewiston Sugar Company hereinbefore referred to, and Secretary of respondent, The Amalgamated Company, from 1915 to the summer of 1919, at which time he became a Director and the General

Manager of said Company, for a period of about nine months from October 1, 1917, resided in the City of Washington, D. C. During said period said Taylor's personal expenses, amounting to $2,320, were paid and reimbursed to him, one-half each, by the corporate respondents.

In November, 1917, respondent, Utah-Idaho Sugar Company, telegraphed said Taylor in Washington, requesting him to use his efforts to persuade the Priority Committee and other Government officials of the "utter needlessness" of the said independent factory, for the purpose of hampering, hindering and delaying the operations of said independent enterprise and the building of its factory.

By reason of the things done and the tactics employed, as in this subdivision above set out, the operations of said independent enterprise and the building of its factory were hampered, hindered and delayed. [188]

(i) The Idaho Co-operative Sugar Company, an independent enterprise, was organized under the laws of the State of Idaho in the year 1919 for the purpose of erecting a beet sugar factory near the town of Filer in said State, and of engaging in the business of purchasing sugar beets and the manufacture and sale of beet sugar in interstate commerce. The site of this proposed independent factory is in territory allocated to the respondent, The Amalgamated Company, in the division of interstate territory between corporate respondents hereinbefore referred to, Exhibit 51. By June, 1920, said independent enterprise had sold $375,000 worth of stock

to farmers in the vicinity of Filer and to other persons, had bought land, and its factory and adjacent buildings were partly erected. Upon said enterprise thus showing substantial evidence of success, respondent Utah-Idaho Company, through one or more agents, sought to discourage investors in the region of Filer and elsewhere from purchasing stock in said independent enterprise on the ground that such investors would lose money. Respondent, The Amalgamated Company, in the spring of 1920 deposited $10,000 to its general account in a bank at Filer, Idaho, and in the same month made a substantial deposit in a bank in Kimberly, Idaho. Before this time said respondent had maintained no deposits either in these banks or in other banks in the towns of Filer and Kimberly. These deposits were made by respondent for the purpose of securing the co-operation and assistance of said banks in obstructing the financing of said independent enterprise and to prevent the obtaining of credit by it.

(j) The Southern Utah Company, an independent enterprise, was incorporated in November, 1915, under the laws of the State of Utah for the purpose of building a beet sugar factory near the town of Delta, Utah, and of engaging in the business of purchasing sugar beets and the manufacture and sale of beet sugar in interstate commerce. Said company had entered into a contract for the erection of its factory and had sold stock in Utah and other places, when respondent Utah-Idaho Company, through its agent, James M. Davis, threatened one of the directors of said independent enterprises, say-

ing in effect that respondent Utah-Idaho Company would not permit the erection of said independent factory and that if the same were erected, said respondent would go to any length necessary to ruin said independent enterprise, and, further, said respondent sent agents about the territory adjacent to said proposed factory to induce, and they did induce, farmers not to contract for growing beets for said independent enterprise and to break contracts already entered into. Among other inducements, this respondent offered to loan, and did loan, to farmers money on long-time mortgages at 6% interest, and caused farmers by reason of such loans to break contracts which they had entered into with the Southern Utah Company. One James E. Steel besought Merrill Nibley, Assistant Manager of the Utah-Idaho Sugar Company, respondent, to desist from interfering with the plans of the Southern Utah Company and said Nibley's reply to Steel was, "We have got them on the run and will keep them on the run." The attempt to construct a factory by the Southern Utah Company was thus abandoned.

Shortly thereafter the Delta Beet Sugar Corporation, an independent enterprise was incorporated under the laws of the State of New York, for the purpose of building a beet sugar factory at the town of Delta, Utah, and to engage in the business of purchasing sugar beets and the manufacture and sale of beet sugar in interstate commerce. The factory was built and operated by said Delta Beet Sugar Corporation in its aforesaid business in competition with the corporate respondents, and

in September, 1918, the respondent, Utah-Idaho Com., secretly employed respondent, E. R. Woolley, to go to New York City, New York, and there interview the owner of the assets of said Delta Corporation, and the said E. R. Woolley made untruthful statements regarding the value of said corporation's factory, with the purpose and object of discouraging said owner to the end that he would quit operating said corporation's factory and convey the same to respondent, Utah-Idaho Company, at an unreasonably low price. Thereafter in January, 1920, respondent Utah-Idaho Company, through respondent Woolley, as its agent, purchased practically all the stock of said independent enterprise and all of its properties and assets in the name of the Great Basin Sugar Company to which company said stock, properties and assets were transferred. The Great [189] Basin Sugar Company was organized under the laws of the State of Delaware by the respondent Woolley and certain individuals secured by him to act as incorporators and directors, for the purpose of acting as purchaser of aforesaid stock, properties and assets, which were purchased for the sum of $1,600,000, and certain other considerations, and the transaction was financed by respondent Utah-Idaho Company. Thereafter the Great Basin Sugar Company sold to the respondent Utah-Idaho Company all said stock, properties and assets acquired from the Delta Beet Sugar Corporation. In connection with the foregoing transactions the Delta Beet Sugar Corporation, and certain other individuals in-

terested therein, executed a written contract never thereafter to engage in the sugar industry or in any allied or associated industry in the State of Utah. As a result of the foregoing transactions, said independent enterprise was merged with respondent Utah-Idaho Company and the competition theretofore existing between said independent enterprise and corporate respondents as hereinbefore set out, was eliminated.

(k) On or about March 8th, 1920, the respondent Utah-Idaho Sugar Company caused to be published and circulated in nine newspapers in the State of Idaho, and in thirty-seven newspapers in the State of Utah, all circulating in the territory wherein competing independent enterprises and factories were and are operating, certain advertisements addressed to farmers and beet growers, containing insinuating statements to the effect that such competing companies were unreliable and financially irresponsible, and suggesting that farmers could safely contract for growing beets only with corporate respondents.

(l) On or about February 25th, 1920, respondent, Utah-Idaho Sugar Company purchased advertising space in several weekly and daily newspapers circulating in Utah and Idaho where competing independent enterprises and factories were operating and advised the publishers of said newspapers that it was planning to extend its advertising activities and would choose, as a medium, the paper friendly and loyal to its, said respondent's organization, thus seeking to influence by the use of great

wealth the editorial policies of said newspapers to be in favor of corporate respondents as against competitors in regard to the beet sugar industry.

Respondent at all times mentioned hereinbefore and in the record of this proceeding, and up to the time when the taking of testimony ceased, were continuing to carry out the purpose of the secret agreement, combination and conspiracy hereinbefore set out by means of acts, practices and conduct of a nature similar to the acts and things done to carry out said conspiracy hereinbefore set out, and said acts and things done, had and have the effect of obstructing, hindering, suppressing and eliminating competition in the purchase of sugar beets and the manufacture and sale of beet sugar in interstate commerce, and especially in the States of Utah, Idaho, Oregon, Washington and Nevada.

CONCLUSION.

The acts and things done by respondents as hereinbefore set out under the conditions and in the circumstances described in the foregoing findings, constitute unfair methods of competition in violation of the provisions of Section 5 of the Act of Congress approved September 26, 1914, entitled, "An Act to Create a Federal Trade Commission, to define its powers and duties, and for other purposes."

By the Commission.

[Seal] VICTOR MURDOCK,
Chairman.

Dated this 3d day of October, A. D. 1923.

Attest: OTIS B. JOHNSON,
Secretary. [190]

UNITED STATES OF AMERICA.

Before FEDERAL TRADE COMMISSION.

At a Regular Session of the Federal Trade Commission Held at Its Office in the City of Washington, D. C., on the 3d Day of October, A. D. 1923. Present: VICTOR MURDOCK, Chairman, JOHN F. NUGENT, HUSTON THOMPSON, VERNON W. VAN FLEET, NELSON B. GASKILL, Commissioners.

DOCKET No. 303.

FEDERAL TRADE COMMISSION

vs.

UTAH–IDAHO SUGAR COMPANY, AMALGAMATED SUGAR COMPANY, E. R. WOOLLEY, A. P. COOPER and E. F. CULLEN.

ORDER TO CEASE AND DESIST.

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answers of the respective respondents (E. F. Cullen not having appeared or answered), the testimony and evidence, and the argument of counsel, and the Commission having made its findings as to the facts with its conclusion that the respondents have violated the provisions of the Act of Congress, approved September 26, 1914, entitled, "An Act to Create a Federal Trade Commis-

sion, to define its powers and duties, and for other purposes."

NOW, THEREFORE, IT IS ORDERED, that the respondents, Utah-Idaho Sugar Company, and the Amalgamated Sugar Company, each of them and their officers, agents and employees and E. R. Woolley and A. P. Cooper, shall forever cease and desist from conspiring or combining between and among themselves to maintain or retain the monopoly of corporation respondents hereinbefore set out; to prevent the establishment of beet sugar enterprises and the building of sugar factories by persons or interests other than said corporation respondents, and to hinder, forestall, obstruct or prevent competitors or prospective competitors from engaging in the purchase of sugar beets, and in the manufacture and sale of refined beet sugar in interstate commerce, and from effecting or attempting to effectuate such conspiracy and combination;

(1) By respondent corporations allocating to themselves certain territory and establishing interstate territorial divisions lines to be observed by and between themselves in the obtaining of sugar beets and the building of beet sugar factories for the purpose [191] of unlawfully protecting the said respondent corporations against competitors who may endeavor to come into such allocated territory for the purpose of obtaining sugar beets for the purpose of building factories for the manufacture of beet sugar.

(2) By intimidation, untruthful statements or otherwise, preventing, hindering or attempting to

prevent or hinder the Dyer Company, a corporation of Cleveland, Ohio, a manufacturer of beet sugar factory machinery and builder of beet sugar factories in the United States or any other such manufacturer, from engaging in interstate commerce in selling, building and equipping beet sugar factories for competitors or prospective competitors who are engaged or who are about to engage in the purchase of sugar beets and the manufacture and sale of refined beet sugar in interstate commerce.

(3) By using their financial power and influence so as to cause banks and others to refuse credit to and to discourage competitors and prospective competitors from engaging in the purchase of sugar beets and the manufacture and sale of refined beet sugar, in interstate commerce.

(4) By using their financial power and influence to purchase land and erect factories in the territory where competitors or prospective competitors intend or shall undertake to start in the business of purchasing sugar beets and of manufacturing and selling refined beet sugar in interstate commerce, when such purchases or erections are not done in good faith and for no other purpose than to forestall, obstruct and prevent competitors and prospective competitors from engaging in the business of purchasing sugar beets and of manufacturing and selling refined beet sugar in interstate commerce.

(5) By inducing beet growers to break or cancel contracts for the production of sugar beets for competitors or prospective competitors by promises to build sugar factories when said respondent corpora-

tions have no intention of constructing same but make such promise solely for the purpose of causing breach of contracts for said production in order thereby to prevent or hamper the building of prospective competing factories or the operation of existing competing factories.

(6) By circulating and publishing false, misleading and unfair statements concerning the machinery and equipment of competitors or prospective competitors factories, or the fitness of such machinery to successfully manufacture refined beet sugar.

(7) By circulating and publishing false, misleading and unfair statements concerning the (a) ability of competitors or prospective competitors to get and pay for beet seed; (b) adaptability to raising sugar beets of land or territory in the localities where competitors are located or are intending to locate; (c) ability of competitors or prospective competitors to producers or growers for sugar beets contracted for or delivered to them.

(8) By making untruthful and unjustifiable statements against competitors or prospective competitors to induce, persuade and influence United States Government departments and agents, for the purpose of causing said Governmental departments or agents to use their power and authority to prevent the building of factories for the manufacture and sale in interstate commerce or refined beet sugar by competitors or prospective competitors.

(9) By offering to advertise in newspapers circulating in the localities of the States of Utah, Idaho, Oregon and Montana or elsewhere, where

competitors operate or prospective competitors intend to build and operate beet sugar factories, with the understanding that editorial policies shall be in favor of corporation respondents as against competitors in regard to the beet sugar industry. [192]

(10) By inducing beet growers or others, through false, unfair and misleading statements, to withdraw their support from, and to breach contracts for the growing of sugar beets with, competitors and prospective competitors in the manufacture and sale in interstate commerce of refined beet sugar, thereby depriving said competitors of, or hampering them in, the ability to compete with corporation respondents.

(11) By circulating and publishing false, misleading and unfair statements concerning the financial standing and responsibility of competitors or prospective competitors for the purpose of preventing or hampering the sale or disposition of the stocks, bonds and promissory notes of such competitors, or of otherwise causing said competitors financial embarrassment.

(12) By financing and furnishing money to secret and undisclosed agents or employees for the purpose of annoying, harassing and eliminating ment to competitors or prospective competitors by purchasing or acquiring secretly the whole or a controlling interest in the business of competitors or prospective competitors who are engaged, or who intend to engage, in the manufacture and sale of refined beet sugar in interstate commerce.

(13) By financing and furnishing money to secret and undisclosed agents or employees for the purpose of annoying, harassing and eliminating competitors and prospective competitors by instituting unjustifiable and groundless litigation and law suits.

(14) By circulating false, misleading and unfair statements in writing or orally concerning the honesty, integrity or ability of the promoters, officers or employees of competitors or prospective competitors engaged in or about to engage in the purchase of sugar beets and the manufacture and sale in interstate commerce of refined beet sugar.

(15) By utilizing any other equivalent means not hereinbefore stated of accomplishing the object of unfairly preventing, forestalling, stifling or hampering the business of competitors and of those about to compete with corporation respondents in the purchase of sugar beets and the manufacture and sale of refined beet sugar in interstate commerce.

No service of the complaint having been made upon the respondent, E. F. Cullen, IT IS FURTHER ORDERED that the complaint herein be, and the same is hereby, dismissed as to the said respondent, E. F. Cullen.

By the Commission, Commissioners Van Fleet and Gaskill, dissenting. Memorandum dissent by Commissioner Van Fleet attached.

[Seal] OTIS B. JOHNSON,
Secretary. [193]

June 4, 1923.

FEDERAL TRADE COMMISSION

vs.

UTAH–IDAHO SUGAR COMPANY et al.

DISSENT BY COMMISSIONER VAN FLEET.

In this case the respondents are engaged in the manufacture and sale of beet sugar. The sugar is sold in interstate commerce. The manufacture is intrastate. This proceeding is based on Section 5 of the Federal Trade Commission Act which declares unlawful unfair methods of competition in commerce. The fact that respondents are engaged in commerce in selling sugar produced has no bearing on the case for the reason that the proof does not show any acts of unfair competition in such product. The fact that a respondent is engaged in commerce is not material unless the acts charged have to do with such commerce or that of its competitors in such commerce. The acts to which the proof is directed are concerning only the manufacture. The manufacture of sugar from beets is somewhat peculiar in that it is necessary to have the factory located where beets may readily be obtained by short haul. It is not profitable to ship the beets a great distance to the factory. The acts to which the proof is directed consisted in the effort of respondents to prevent competing factories being located in contiguous territory where they might absorb a part of the supply of beets to respondents' factories. It was at most a pre-

vention of competition in the purchase of the raw material for manufacture within the state, and, in no case does the proof show an interference with the transport of beet from one state to another, or an interference with the purchase thereof.

It is well settled that production and manufacture is not commerce. Coe vs. Errol, 116 U. S. 517; Kidd vs. Pearson, 128 U. S. 1; United States vs. E. C. Knight Co., 156 U. S. 1; Capital City Dairy Co. vs. Ohio, 183 U. S. 238; McCluskey vs. Marsville & Northern Ry. Co., 243 U. S. 251; Arkadelphia Milling Co. vs. St. Louis Southwestern Ry. Co., 249 U. S. 134; The Coronado Case, 259 U. S. 344; Hammer vs. Dagenhart, 247 U. S. 251.

The fact that an article in process of manufacture is intended for export to another state does not render it an article of interstate commerce. Crescent Oil Company vs. Mississippi, 257 U. S. 129. But it is contended in support of the jurisdiction of the Commission that such interference with the source of supply of respondent's competitors affects the ability of such competitors to produce sugar to be sold in interstate commerce and that such acts are thus an interference with such commerce. This theory is based on those cased holding that intrastate acts which directly interfere with a current of commerce may be controlled by Congress. Swift vs. U. S., 196 U. S. 375; United States vs. Patten, 226 U. S. 525; United States vs. Ferger, 250 U. S. 199; Stafford vs. Wallace, 257 U. S. ——; Board of Trade of the City of Chicago vs. Olsen et al., U. S. Sup. Apr. 16, 1923. [194]

There is no conflict between the cases holding that production and manufacture are not commerce and the doctrine laid down in the Swift and following cases. In the first case there is no interstate commerce unless the acts themselves are such. In the second case there *already is* interstate commerce which is being affected or obstructed by the intrastate acts. Confusion may arise if the intrastate acts regulated under the doctrine in the Swift case be compared with intrastate acts where there is not already commerce.

Purely intrastate acts may or may not come under the Federal jurisdiction depending on whether they affect *existing* intrastate commerce. The *same acts* thus may or may not be subject to such jurisdiction. This is well illustrated in the two cases of Hill vs. Wallace, 42 Sup. Ct. Rep. 453; Board of Trade of the City of Chicago vs. Olsen et al., U. S. Sup. Apr. 16, 1923. When such acts are subject to such jurisdiction it is not because they are commerce, but because they affect or obstruct it.

In the present case there is no commerce to obstruct until the beets are manufactured into sugar and such sugar has been placed in transport. The argument is, however, as stated above, that the acts here cut off at the source such commerce. It is only such acts as *directly* interfere with commerce which come under the Federal jurisdiction. The line must be drawn somewhere, else all jurisdiction in trade or production would become Federal. Hence Congress has no jurisdiction of such acts as only indirectly or remotely affect commerce. In the

instant case if interference with production and manufacture into sugar of beets is an obstruction to a later or unborn commerce in sugar to be made from the beets, one with intrastate sold defective beet seed, thus preventing the production of beets to be manufactured into sugar, would be in commerce. Or one who sold fertilizer to raise the seed to plant the beets to make the sugar to be shipped in commerce would be in commerce.

(Signed) VERNON W. VAN FLEET,
Commissioner.

[Endorsed]: U. S. District Court, District of Idaho. Filed Mar. 14, 1924. W. D. McReynolds, Clerk. [195]

[Title of Court and Cause.]

ORDER CONFIRMING SALE OF REAL AND PERSONAL PROPERTY.

This cause came on further to be heard on the report of A. V. Scott, Receiver herein, dated March 1st, 1924, and the objections of the defendant to confirmation of the sale, filed herein on the 14th day of March, 1924, and on all other proceedings in the above-entitled cause, and the objections of the defendant to confirming the sale having been presented to the Court, and the Court being fully advised in the premises, finds, adjudges and decrees, as follows:

That the orders of the Court heretofore made herein requiring the Receiver to sell, after notice, all of the property of the defendant, Beet Growers

Sugar Company, a corporation, have been fully complied with, including the [196] requirements made by the Court in the supplemental order of sale dated February 7th, 1924, and due proof of the publication of notices of said sale have been filed herein;

That the sale of said property held on March 1st, 1924, was held in all respects as provided by the orders of this Court and according to the requirements of the published notices thereof;

That the property was sold as a single operating unit and that the bid of the Utah-Idaho Sugar Company, of Salt Lake City, State of Utah, for the sum of Eight Hundred Thousand ($800,000.00) Dollars was the highest and best bid received for said property;

That the said bidder has paid to the Receiver the sum of Ten Thousand ($10,000.00) Dollars to apply on the purchase price so to be paid for said property on confirmation;

On consideration,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, as follows:

That the objections of the defendant, Beet Growers Sugar Company, to confirming the sale of said property so made by the Receiver be, and they are, hereby overruled and disallowed;

That the Receiver's report of sale filed herein is in all things confirmed, and the sale therein reported is hereby ratified and approved, subject to the rights of the defendant and other parties to the action to redeem said property from said sale within

the time prescribed in the original order of sale heretofore made herein, [197] to wit: the said defendant, Beet Growers Sugar Company, a corporation, shall have to and including the 15th day of June, 1924, within which to redeem said property from said sale, and if said defendant, Beet Growers Sugar Company, shall not on or before said date make redemption of said property, then and in that event any organization of the preferred stockholders of the defendant, Beet Growers Sugar Company, comprising at least thirty (30%) per cent of the outstanding preferred stock may, on or before the 15th day of September, 1924, redeem, provided and upon condition that said organization of said stockholders shall not exclude any preferred stockholder but that within a reasonable length of time all preferred stockholders may come into the said organization upon an equal footing, and the said right of redemption shall be further subject to the orders of the Court before made herein.

It is further ORDERED that any taxes which the purchaser may pay before the date of redemption shall be added to the amount to be paid by the redemptioner, with interest as provided in the orders of the Court in the case of the purchase money.

It is further ORDERED that the purchaser shall, within five days of the date hereof, pay to the said Receiver the further sum of Seventy Thousand ($70,000.00) Dollars, lawful money of the United States, and that on or before the 1st day of April, 1924, the said purchaser having agreed thereto it shall pay to said Receiver the further sum of Seven

Hundred and Twenty Thousand ($720,000.00) Dollars, lawful [198] money of the United States, and that if said purchaser shall make said payments on April 1st, 1924, then no interest shall be charged upon the purchase price.

That the real property sold by said Receiver as aforesaid, is particularly described as follows, to-wit:

> Those certain lots, parcels and pieces of land situate in the County of Jefferson, State of Idaho, particularly described as follows: Beginning at Southwest (SW.) corner of Section eight (8), Township four (4), North Range Thirty-nine (39), East of Boise Meridian, running thence East Eighty-three (83) rods, thence North Eighty (80) rods, thence East Seventy-seven (77) rods, thence North Sixty-three (63) rods, more or less, to the Parks and Lewisville Canal, thence along the said canal to the west line of said Section Eight (8); thence South One Hundred Twenty-seven (127) rods to the place of beginning, but subject to that certain right-of-way of the Oregon Short Line Railroad Company One Hundred (100) feet wide, running diagonally across the above-described land in a Northeasterly and Southwesterly direction, together with all buildings, structures, residences, beet sheds and other improvements upon said premises, and all canals, ditches and water rights appurtenant thereto, or used in connection therewith, together with all and singular, the tenements, hereditaments and ap-

purtenances thereunto belonging or in anywise appertaining.

The Receiver is directed, upon the payment and settlement of the purchase price as heretofore specified, or as may be permitted by any other order or any other decree made in this cause, and after the expiration of the period of redemption and there having been no redemption, to execute and deliver to Utah-Idaho Sugar Company, a corporation, its successors or assigns, the deed and bill of sale conveying to said purchaser, its successors or assigns, the property so sold to it as aforesaid and included within the said order of sale of date January 25th, 1924.

Dated March 15th, 1924.

FRANK S. DIETRICH,
United States District Judge.

[Endorsed]: U. S. District Court, District of Idaho. Filed Mar. 15, 1924. W. D. McReynolds, Clerk. [199]

[Title of Court and Cause.]

ORDER AUTHORIZING RECEIVER TO DISBURSE MONEY RECEIVED FROM SALE OF PROPERTY.

Upon consideration, It is Ordered:

1. That the Receiver go to Salt Lake City, Utah, to receive payment of the balance remaining unpaid on the purchase price of the sugar factory, and deposit the amount so received in three banks in Salt

Lake City to be selected by the Receiver with the view to safety and security, approximately one-third of the money so received to be deposited in each of said banks to the credit of A. V. Scott, Receiver, and the money so deposited shall be deemed to be in the possession of the Court.

2. That thereupon the Receiver forthwith pay out of the money so received and deposited to the Columbia Trust Company, plaintiff herein, the total amount due on account of the outstanding bonds as shown on Exhibit "A," attached to the "Order for Sale by Receiver," made herein and dated January 25th, 1924, namely the aggregate sum of $337,345.33, together with interest thereon, computed at the rate of seven per cent per annum from January 15th, 1924, to and including March 31st, 1924, said money so paid to the plaintiff, as trustee, to be held and distributed by it to the several creditors as set forth and specified in said Exhibit "A," without diminution or charge by or on the part of the plaintiff; it being the [200] intent hereby that the plaintiff as trustee shall pay to each of the persons named in said exhibit the amount therein stated to be due to each of said creditors, together with interest thereon at seven per cent for the period above named. Said payments to the creditors shall be made to them only upon receipt by the plaintiff trustee of all outstanding bonds, held either in absolute ownership or as collateral, and other evidences of indebtedness, by or for the use of said several creditors, and said bonds and other evidence shall by the trustee be delivered to the clerk of this court for cancellation.

3. The Receiver shall forthwith pay to the plaintiff trustee the additional amount of $10,000.00 on account of compensation for the trustee and for expenses, including counsel fees—$6,000.00 thereof to be paid over to counsel for the trustee. Inasmuch as the total amount to be paid for these purposes has not been finally fixed, such payment will be understood to be on account merely.

4. The Receiver is also directed to pay, without unnecessary delay, $3,196.79, together with interest thereon at the rate of seven per cent per annum from October 20th, 1922, to and including March 31st, 1924, to satisfy judgments referred to in paragraph 4 of said order for sale dated January 25th, 1924, either to the judgment creditors or to their counsel of record, the Receiver taking receipts therefor and requiring that said judgments be satisfied of record.

5. The Receiver is further directed, out of said moneys, to pay all unsecured claims against the defendant Beet Growers Sugar Company, together with interest thereon as provided for by the contracts covering such claims, or, where there is no contract, at the rate of seven per cent per annum from the due date of claims up to and including the [201] 31st day of March, 1924, provided said claims have been heretofore presented to the Receiver and audited by him and found to be correct. No such claims are to be paid until further order, unless they have been so presented and the Receiver is fully satisfied that they are justly due. In all cases of payment the Receiver will take up the evi-

dences of the indebtedness and take a receipt in full. In any case of doubt as to who is the present holder of the claim, payment should be withheld until the matter can be presented to the Court for further direction.

6. On or prior to the 15th of April, 1924, the Receiver is directed to prepare and file herein a full detailed report of all receipts on account of the sale of said property under said order of January 25th, 1924, and of all disbursements made of said receipts, with vouchers covering said disbursements, and with statements from each bank of deposit of the balance in said bank to the credit of the Receiver upon the specified day.

7. To the end that the Receiver may keep in his possession vouchers for disbursements, it is suggested that in each case of disbursement he take a receipt in duplicate so that he may retain the duplicate and file the original with the clerk.

Dated: Pocatello, Idaho, March 28th, 1924.

FRANK S. DIETRICH,
District Judge.

[Endorsed]: U. S. District Court, District of Idaho. Filed Mar. 28, 1924. W. D. McReynolds, Clerk. [202]

At the March term of the District Court of the United States within and for the District of Idaho, begun and held at the City of Pocatello on the 14th day of March, A. D. 1924. Present: Honorable FRANK S. DIETRICH, Judge.

Among the proceedings had were the following, to wit:

COLUMBIA TRUST COMPANY,

Trustee,

vs.

BEET GROWERS SUGAR COMPANY et al.,

Defendants,

and

E. D. HASHIMOTO,

Intervenor.

MINUTES OF COURT—MARCH 14, 1924—ORDER RESALE OF PROPERTY, ETC.

This cause came up for hearing objections to the confirmation of the sale of the property by the Receiver. S. A. King, Esq., appearing in objection to the confirmation as counsel for the defendant Beet Growers Sugar Company. Otto McCutcheon, Esq., appearing as counsel for the Receiver.

The Court, after hearing counsel, confirmed the sale; allowing exceptions to the defendant Beet Growers Sugar Company. Exceptions were also allowed said defenadnt to the refusal of the Court to grant its petition of March 1st for the postponement of the Receiver's sale. [203]

[Title of Court and Cause.]

STATEMENT OF FACTS ON DEFENDANT'S APPEAL FROM ORDERS FOR RECEIVER'S SALE AND ORDER CONFIRMING SUCH SALE.

BE IT REMEMBERED, That * * * [203—1] on October, 18th, 1923, appellant filed an answer to plaintiff's amendment to its complaint.

Hearing on the complaint and amendments thereto, and upon Hashimoto's petition for sale and the answer thereto, was set for October 31st, 1923. On October 31st, 1923, one H. E. Deardorff, a creditor, was permitted to intervene, and accordingly filed an answer in intervention, among other things attacking the validity of the trust deed upon which the complaint is predicted. On the same day, to wit, October 31st, [203—5] 1923, the evidence taken before the Examiner was submitted, and testimony was also given in relation to certain issued presented by the complaint, and as to the expenses and compensation of the trustee and its attorneys, and also upon special issues raised by the petition for sale of the property as an entirety and without redemption. This latter testimony related mainly to the history of the enterprise, the construction of the plant, its operation for a short period before the receivership, description of the factory and appurtenant personal property, the extent of the tributary territory and competitive conditions, all having some bearing, remote or direct, upon the sale value of the property, if sold in entirety and

if sold in separate parcels; the feasibility of the sale in entirety and the feasibility of the sale in separate parcels; the probability or improbability of securing bidders in case a sale should be attempted with the right to redeem at any time within a year after the sale. Among other things the testimony tended to show that the property of the appellant consisted of a beet sugar factory, located on a 100-acre site near Rigby, Idaho, and in addition thereto personal property used therewith; that appellant has approximately thirty-four beet receiving stations located at various points in the beet growing territory, generally on leased land, with mechanical loaders and scales; that it also has auto trucks, cultivators, seeders, crane, extra parts for machinery, supplies, materials, etc.; that all of this personal property is necessary in the operation of the factory, and if sold separately from the factory would have to be replaced in order to operate the factory; that the beets are manufactured into sugar during a period from about October 10th or 15th to the middle of January the following year; that the Rigby factory is located in territory which may be served by factories of the Utah-Idaho Sugar Company, and there is competition for the beet acreage; that each year it is necessary to begin contracting with the farmers for beets the latter part of the winter or early spring for the growing of beets for that [203—6] season; that the failure to operate the factory in any one year results in competitors securing the beet acreage from the farmers, and loss of patron-

age to the factory on the resumption of operation; that it is customary for the best sugar company to furnish seed to the farmers, the seed being generally imported from Europe, and it is necessary to order it in time for the spring planting.

Intervenor, E. D. Hashimoto also introduced in evidence the certificate of the Secretary of State showing that the charter of the Beet Growers Sugar Company, an Idaho corporation, was forfeited on November 30th, 1922, for the nonpayment of the annual license tax required to be paid by the statutes of the State of Idaho.

Defendant introduced in evidence over the objection of intervenor, E. D. Hashimoto, a certificate from the Secretary of State of Idaho, showing that on July 27th, 1923, the Beet Growers Sugar Company paid to the Secretary of State of Idaho the sum of $163.00, and said Secretary of State thereupon issued a certificate of reinstatement for said corporation.

Intervenor's objection being based on the ground that it was immaterial and could not change or affect any vested right of the preferred stockholders resulting from said forfeiture and no authority on behalf of any individual to reinstate said corporation.

Thereafter elaborate briefs were filed, anl upon consideration the Court made and on December 28th, 1923, filed a memorandum decision in which there are certain findings of fact and a statement of certain conclusions, one of which was that a receivership sale and not a foreclosure sale should be had.

A further hearing for certain purposes was stated to be necessary, and January 7th, 1924, was designated as the time for holding it. Reference is made to this order for particulars, and especially for an exhibit of the condition of the receivership estate at that time. At the hearing on January 7th, some [203—7] additional evidence was received. touching certain claims, and in addition thereto the evidence taken in October, relative to the character and value of the property and the relation of the different parties to the whole and the value thereof, was supplemented as follows: [203—8]

TESTIMONY OF H. A. BENNING, FOR INTERVENOR.

Mr. H. A. BENNING was sworn and examined by Mr. Johnson, attorney for the intervenor and testified as follows:

In the past season I was joint lessee with Mr. Sinsheimer in the operation of the Beet Growers Sugar Company. We were the assignees of the lease of Hashimoto.

I am not a graduate engineer, I could qualify as a sugar house engineer. I am a member of the American Society of Mechanical Engineers. I have spent all my life in the construction and operation of sugar factories.

I was connected with the Holly Sugar corporation for five years as superintendent, entirely in charge of operations.

I started with the Great Western Sugar Company and finished as superintendent for five years.

(Testimony of H. A. Benning.)

I was general superintendent for the Amalgamated Sugar Company for four years. My occupation during these times was both in the construction and operation of the plants. I actually supervised the construction of three plants and assisted with three others and in rebuilding several.

I am familar with the Rigby plant of the Beet Growers Sugar Company. I operated that plant during the last campaign. It has a capacity of 750 tons. We haven't been able to do any better than that this season.

In my work in connection with the construction of plants I have become familiar with the value of sugar plants and the cost of building and equipping them in a general way.

In my opinion the value of the Beet Growers Sugar Company plant at Rigby as it stands in that locality is $500,000.00. It would cost in my opinion $100,000.00 for improvements to put the plant in good operating condition. The plant is situated in a territory where there are already five factories. This year there was a probable output of 250,000 tons in the entire territory, which is not enough for a factory of that size, a factory of that size should have at least two-fifths of the entire acreage, which it cannot possibly expect to get. We should have 9,000 acres to properly run the plant 90,000 tons. This year we have about 2500 acres and paid for 25,000 tons of beets. In its present condition the property has practically no beet dumps.

(Testimony of H. A. Benning.)

The $100,000.00 necessary for betterments should be expended for beet dumps and changing the beet distributing system in the sheds. In order to get additional acreage of beets we should have at least twelve additional receiving stations, which would cost at least $50,000.00. [203—9]

If we had reasonable tonnage of beets we would have to put in another railroad high line over the sheds to be used in unloading the beets and the distribution system for the beets should be changed and replaced by a belt conveying system instead of the distribution by means of water.

In a general way I am familiar with the cost of plants. The Smithfield factory of the Amalgamated Sugar Factory cost about $450,000.00 and this plant this last year had a slicing capacity of 1,087 tons, but this price did not include the beet dump-receiving stations, which would cost about $50,000.00 additional. The factory was constructed in 1917.

I based the value of the Rigby factory on its present locality, for a sugar factory is worth directly in proportion to the tonnage of beets it can get and this territory to produce the maximum capacity of beets would take several years to work up to that point. The plant is located in the poorest section of that territory, on account of there being very little wagon deliveries and this means most of the beets have to be shipped in with additional cost of freight.

In my opinion it would cost to reconstruct a plant equally as good as that with all beet loading sta-

Lake City to be selected by the Receiver with the view to safety and security, approximately one-third of the money so received to be deposited in each of said banks to the credit of A. V. Scott, Receiver, and the money so deposited shall be deemed to be in the possession of the Court.

2. That thereupon the Receiver forthwith pay out of the money so received and deposited to the Columbia Trust Company, plaintiff herein, the total amount due on account of the outstanding bonds as shown on Exhibit "A," attached to the "Order for Sale by Receiver," made herein and dated January 25th, 1924, namely the aggregate sum of $337,345.33, together with interest thereon, computed at the rate of seven per cent per annum from January 15th, 1924, to and including March 31st, 1924, said money so paid to the plaintiff, as trustee, to be held and distributed by it to the several creditors as set forth and specified in said Exhibit "A," without diminution or charge by or on the part of the plaintiff; it being the [200] intent hereby that the plaintiff as trustee shall pay to each of the persons named in said exhibit the amount therein stated to be due to each of said creditors, together with interest thereon at seven per cent for the period above named. Said payments to the creditors shall be made to them only upon receipt by the plaintiff trustee of all outstanding bonds, held either in absolute ownership or as collateral, and other evidences of indebtedness, by or for the use of said several creditors, and said bonds and other evidence shall by the trustee be delivered to the clerk of this court for cancellation.

3. The Receiver shall forthwith pay to the plaintiff trustee the additional amount of $10,000.00 on account of compensation for the trustee and for expenses, including counsel fees—$6,000.00 thereof to be paid over to counsel for the trustee. Inasmuch as the total amount to be paid for these purposes has not been finally fixed, such payment will be understood to be on account merely.

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7. To the end that the Receiver may keep in his possession vouchers for disbursements, it is suggested that in each case of disbursement he take a receipt in duplicate so that he may retain the duplicate and file the original with the clerk.

Dated: Pocatello, Idaho, March 28th, 1924.

FRANK S. DIETRICH,
District Judge.

[Endorsed]: U. S. District Court, District of Idaho. Filed Mar. 28, 1924. W. D. McReynolds, Clerk. [202]

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In my opinion the value of the Beet Growers Sugar Company plant at Rigby as it stands in that locality is $500,000.00. It would cost in my opinion $100,000.00 for improvements to put the plant in good operating condition. The plant is situated in a territory where there are already five factories. This year there was a probable output of 250,000 tons in the entire territory, which is not enough for a factory of that size, a factory of that size should have at least two-fifths of the entire acreage, which it cannot possibly expect to get. We should have 9,000 acres to properly run the plant 90,000 tons. This year we have about 2500 acres and paid for 25,000 tons of beets. In its present condition the property has practically no beet dumps.

(Testimony of H. A. Benning.)

The $100,000.00 necessary for betterments should be expended for beet dumps and changing the beet distributing system in the sheds. In order to get additional acreage of beets we should have at least twelve additional receiving stations, which would cost at least $50,000.00. [203—9]

If we had reasonable tonnage of beets we would have to put in another railroad high line over the sheds to be used in unloading the beets and the distribution system for the beets should be changed and replaced by a belt conveying system instead of the distribution by means of water.

In a general way I am familiar with the cost of plants. The Smithfield factory of the Amalgamated Sugar Factory cost about $450,000.00 and this plant this last year had a slicing capacity of 1,087 tons, but this price did not include the beet dump-receiving stations, which would cost about $50,000.00 additional. The factory was constructed in 1917.

I based the value of the Rigby factory on its present locality, for a sugar factory is worth directly in proportion to the tonnage of beets it can get and this territory to produce the maximum capacity of beets would take several years to work up to that point. The plant is located in the poorest section of that territory, on account of there being very little wagon deliveries and this means most of the beets have to be shipped in with additional cost of freight.

In my opinion it would cost to reconstruct a plant equally as good as that with all beet loading sta-

(Testimony of H. A. Benning.)

tions complete from $650,000 to $700,000—a plant equal in capacity which amounts to the same thing.

Cross-examination by Mr. KING.

I never have had an occasion to examine this property for the purpose of determining the replacement value, have made no examination for this purpose.

The value of the factory site was small in proportion to the property.

I think there was something like 100 acres and in that locality I think the land is worth $5,000. I could buy a better factory site in that valley a little farther north for $5,000.

I do not know what the cost of constructing the main factory building was. I am taking my valuations from what you could contract with the Dyer Construction Company or other iron works, for a factory building. I never have personally entered into any contract for the construction of a factory of this capacity.

I do not know what would be the replacement value of the main factory building and could not say what the replacement value of the sugar warehouse would be. [203—10]

I think the machine-shop and store-room could be replaced for about $20,000.00 and the warehouse from possibly 15,000 to $20,000. The warehouse is a reinforced concrete building and is from 180 feet to 200 feet long and from 60 to 70 feet wide and 25 feet high. It has steel trusses and proper lights, the floors are concrete.

(Testimony of H. A. Benning.)

I do not know what it would cost to replace the power house, or boiler house or laboratory, or lime kiln building or the reinforced concrete chimney. I don't think a chimney of that kind could be replaced for $15,000, but it ought to be constructed for less now than the time it was built, but I do not know how much less. I have constructed similar smoke stacks—just as high for $7,000.00.

I know only in a general way what it would cost to replace the beet sheds complete, I would say it would be about $45,000 but havn't any figures for that. The beet sheds are constructed with water distributing equipment, and I think they are less than the ordinary beet sheds are. I would say it would take about $30,000 to tear them down and to re-build them. Some of these sheds are constructed of the best material. There is no other beet sheds in the western country built like they are

I think the pulp silo could be replaced for $25,000 but do not know what it would cost for the sewer and water lines.

I would not say at all that $13,300 would be at all disproportionate. I haven't any real judgment what it would cost to replace the molasses tank, but one of 1200 ton capacity would cost close to $5,000, during the war it might have cost $9,000 to construct it. I think that the replacement of cranes complete could be done for $15,000 but do not know what it would cost to replace the garage implements and store house, nor what it would cost to replace the power house. I would not say that it

(Testimony of H. A. Benning.)

could be done for less than $65,000. I would not attempt to state the price of the equipment for the lime house. The factory was designed by Mr. Cooper whom I knew very well, he had set ideas. At the time it was contracted the estimated cost was about $800,000 but it cost 50% more because of premiums necessary to get delivery

Many of the articles that went into the building were purchased during war times and took a premium to get the proper deliveries. I do not think that the prices in effect during 1922 would be extortionate. I do not know what the value of the machinery and equipment and sugar bins would have [203—11] been during 1922. As late as May, 1922, $590,000 would be disproportionate, but I did not build a factory that year and made no estimates as to what it would cost to build the factory, and the figures which I gave in my direct testimony were not based on my estimate obtained as to the actual cost of construction. I did not mean when I estimated the plant at $590,000. I did not base those figures on what the factory would cost. My estimate was merely on the value of the factory in its present location, operating from one-fourth to one-half capacity.

I don't know that the company itself had contracted for over 7,000 acres of beets. They might have produced 6300 acres but they never got the tonnage which was justified in that many acres. Sixty-three hundred (6300) acres might be sufficient to supply the beets necessary. I did not mean to

(Testimony of H. A. Benning.)

imply that there were only 2500 acres adjacent to the factory available. I think we can get more acreage than that.

I know there are a lot of tools, drills and machinery used in connection with the factory and would not say that in May, 1922, their valuation was not $15,000.

There are a lot of portable beet loaders and they were in constant use prior to my leasing the property. I consider them a liability to the company.

Mr. Sinsheimer and myself are not figuring on bidding on the property and Mr. Sinsheimer has not been in consultation with Mr. Hashimoto and others about bidding on the property that I know of. Mr. Sinsheimer has not told me that he was figuring on purchasing the plant. I am a partner with him in the lease and last year we handled 25,000 tons of beets and produced 59,750 bags of sugar. We paid $60,623.00 for the lease.

On the present market price of sugar we would have a profit of over $50,000 for operating the factory. It is not a fact that with present market conditions our profit would equal $125,000.00, I wish it were. I do not think it would be over $60,000. So that this year the operation on an acreage of 2500 acres there was a profit on the operation of the property of at least $110,000. Of course $60,000 of this money was used to bring up the crop and rebuild the factory, but there was actually earned about $110,000.00, and I think about $20,000.00 of this went for agricultural expenses. We earned not

(Testimony of H. A. Benning.)

over $60,000, but I think the net earnings would be $100,000.00 and out of that taxes and other expenses would have to be paid, and this is best year sugar companies have seen in a long time and probably will see. [203—12.]

The company has what is called railroad and high line dumps. If I had the plant I would tear them down, also scales and scale houses of the value of possibly $12,500, and autos, trucks and trailers worth possibly $25,000.00. There were only three that we could make run this year, and I think there are about thirty-four different loading stations tributary to the factory where there are scales and they are necessary to the operation of the factory. These loading stations are with exception of one or two located on leased ground.

I have not seen the report prepared by James J. Burke & Company and I know Mr. Fred G. Taylor, and he is in many ways a competent mill and machinery man and had some experience in building factories.

I know Mr. J. F. Featherstone and I have heard he has had considerable experience. I know him personally. I worked under Mr. Taylor as assistant manager for one year. I would consider his estimate and description of the property as reliable, owing to his standing, as a general thing.

I have never personally contracted for the construction of any plants but have worked for companies, have had actual charge of construction work, but without figuring the cost of construction,

(Testimony of H. A. Benning.)

an engineer always figures the cost. I have contracted for some companies which I have been connected with and have helped in rebuilding other factories. I have contracted for the Holly Sugar Company.

I did not assist in the construction of the Ogden plant or in rebuilding it, but I was connected with the company at that time and the improvement work amounted to about $700,000. The capacity was 1400 tons daily.

I wouldn't say that the original cost of construction was over $1,500,000, and that approximately $700,000 additional was spent to rebuild it. I would not think that it would cost $1,400,000.

The map shown me correctly represents the Rigby plant, the railroad adjacent with the best lines constructed around the valley and roads as they are constructed approximately ten townships and the railroad reached the very heart of the farming district so that no beets will have to be hauled more than three miles to reach the railroad.

In the assignment of the lease from Mr. Hashimoto we had to pay him a little additional amount for the lease privileges. I do not remember the result. He is not interested in the lease.

The average freight haul in that territory is about 40 cents a ton. The average freight haul runs from 25 cents to 85 cents, but would [203—13] average about 40 cents. We paid from 25 cents to 85 cents.

Mr. JOHNSON.—That is all. We have not other

(Testimony of H. A. Benning.)

information available at this time as to the value of the plant.

Mr. KING.—(Representing Beet Growers Sugar Company.) If your Honor please, in not anticipating the testimony that would be taken this afternoon, we have no witness that we could place on the stand to-day, but we could be ready by to-morrow morning. Of course we assume that Burke's report under date of May 24, 1922, is in, and will be considered, and if your Honor cares to have us do so we would present additional evidence on this proposition.

The COURT.—I am used to a wide range of testimony, but this is pretty nearly the limit, the difference between $500,000 and $1,300,000, is very great. I understood the witness to make the estimate of the replacement value at $650,000.

The witness, Benning, was thereupon asked what he meant by replacement, and he stated as the plant is, and that he arrived at that figure from an estimate from the Dyer Company, but that it would not be a duplicate of the plant. The Rigby plant would cost a little more in concrete construction. More than brick. The Rigby plant is well constructed, but out of balance. Some units are a little larger than necessary and some are smaller which results in limiting the capacity, but I think with an expenditure of $45,000.00 the capacity could be increased from 800 tons a day to 1000 tons a day, and I think the plant could be increased by efficient organization with the present equipments.

(Testimony of H. A. Benning.)

I did not base my estimate on the Dyer figures but was taking into consideration the cost of construcing a new plant in Minnesota.

I did not get this information for the express purpose of bidding on the Rigby plant.

Taking everything into consideration the entire plant, personal property and loading stations, I would estimate the cost to replace it as a whole from $650,000.00 to $700,000.00.

The COURT.—From the testimony of the last witness it would seem that the preferred stockholders would be without interest in this plant. [203—14]

There are so many factors that enter into any estimate which would be made of an enterprise of this kind or a plant of this kind and the testimony of this witness as given was material on one of the factors, but is not quite adequate to cover the whole proposition, so I would like to hear some additional testimony to-morrow.

The testimony of what it would cost to replace the plant is not very satisfactory and could not be so unless someone has made an estimate of it and gone over the plant with a view of giving such testimony, and that is one way of getting at the value of the plant for the reproduction cost. It is not conclusive but it is always material unless it can be shown that it is ill-advised or antiquated or for some reason it is not the kind of a plant that should be there. I think I will let the matter go over until to-morrow morning and I think you had better

give some consideration to the advisability of a lease for the current year as well, and possibly you might be able to work out some sort of a scheme by which these preferred stockholders would be protected. I intend up to a certain point to protect all of the preferred stockholders, that is I shall in some manner give them an opportunity to protect themselves and care for their interests and give them adequate opportunity of doing that. If it cannot be done one way it will have to be done in another. If it cannot be done in fixing an upset price it will have to be done in giving them time. I agree with the Intervenor that I would much prefer to dispose of the property outright, if it could be sold for a reasonable price, but it is difficult to determine what would be a fair price in view of the wide range of testimony as it now exists.

Hearing continued to January 8th, 1924.

Mr. STORY.—Your Honor, I would like to make a suggestion or two. Since yesterday's session I have given the matter a good deal of thought. It seems to me to be apparent that if the property is sold at the upset price, such as your Honor has in mind, the sale would be abortive and would simply result in a great deal of delay. I have already stated the reasons for desiring the earliest possible sale. Incidentally, it was [203—15] suggested that perhaps the property should be leased this year. I hadn't expressed an opinion on that subject. I have also given that a good deal of thought. One reason why I was most anxious to have the

property sold without redemption was because I felt that it would bring a larger price, and that failure to do so would result in the property remaining in idleness this year. Counsel suggested yesterday, and again yesterday evening that the property might be leased. I think your Honor also made that suggestion. If the lease could be made immediately so that the lessee could immediately start to get contracts, which I think is of the utmost importance, I have reached the conclusion it is the wise thing to do.

Your Honor suggested, also, that you were going to protect the unsecured creditors and preferred shareholders either by fixing the upset price such as your Honor has suggested, or allowing time before the sale within which they might organize their forces to purchase, or that you would sell with redemption. I suggested to your Honor yesterday that I thought under the facts as you had indicated you had found them in your memorandum opinion, even a sale under foreclosure would give the plaintiff the right to have the sale made without redemption. So far as we are concerned, we feel that the immediate sale of the property is of far more importance than the question of redemption. If the property can be sold under foreclosure at this time without endangering the possibility of the sale being avoided by fixing some large upset price, we would be very glad to have it sold in foreclosure with the equity redemption allowed by law, and we withdraw our request for the sale without re-

demption, and in that event, I think, of course, two things should be done, first, that the unsecured creditors should be placed in a position wherein they can protect themselves by having their claims allowed against the defendant corporation which would give them the right of redemption under the law. In the second case, your Honor would be very much interested in having the property purchased at a price which would of course cover the payment of the receiver's certificates which have just been issued. As I understand the receiver's report, the receiver's certificates which had been issued prior to those issued within the last few days will be covered entirely, paid by the rental of the property for this last year, payment of which is secured by [203—16] adequate bond, so that, so far as the coming sale is concerned, it probably would not be necessary to do more than provide for the payment of the *some* sixty thousand dollars of receiver's certificates. I think it would also be desirable from the standpoint of the bond holders, some of whom have not deposited their bonds with the Columbia Trust Company, to have an upset price fixed in a foreclosure sale which would cover the secured debts, such as the bonds and the receiver's certificates. I think we are all agreed that the property is of at least that value.

The COURT.—Mr. Johnson, you perhaps, have initiated on behalf of your client, at least, the idea of selling without redemption, I think.

Mr. JOHNSON.—I will say to the Court the consideration which moved us to ask for that kind of

sale in the main was this: That the property be sold and preserved as a unit, the real estate and personal property be kept together and not segregated, and that further that kind of sale would enable the purchaser to operate this year, and for that reason would bring more. In other words, a person who could take possession would be willing to pay more if he could operate it. In other words, it could be sold for more, and kept as a going concern. If there is a sale under foreclosure with redemption I am not sure how it could be done, whether this would be sold as a unit, kept together as a unit, redeemed as a unit, or whether it would have to follow the ordinary foreclosure proceedings, and have the personal property sold separately and then—

Mr. STORY.—Could it not be agreed that it be sold as a unit?

The COURT.—The personal property is of such small amount, I think no serious difficulty would be experienced in arranging for a sale so it can be kept together. Probably all parties would agree that would be better. I think that has been agreed all along, that it would be better, yet not an insurmountable difficulty to sell with redemption. While you think it would sell better together, still you wouldn't want that to be considered as an insurmountable obstacle.

My present impression with the testimony yesterday and the other as I have it is such that I wouldn't see the property sacrificed without some prolonged effort to get what it is reasonably worth.

Mr. JOHNSON.—Of course, I think if the Court could in its order [203—17] provide that the unsecured creditors, and the ones following after that, the preferred shareholders, could have the right of redemption, I think that would adequately protect their rights. If the property were sold at an inadequate figure, the more apt it would be for redemption—the chances are greater for redemption. If sold for an adequate figure, they are protected. If sold for far less than its value, then of course, there is the right of redemption, which would adequately protect them.

Thereupon it was suggested that there were certain unsecured claims which had not been adjudicated and the exact amount of all of the indebtedness of the Beet Growers Sugar Company had not been fully settled and determined and it was agreed that E. J. Broberg, former auditor of the company, together with the Receiver, should audit the claims and report the entire amount to the Court and that orders should be made authorizing the appointment of Mr. Broberg and the Receiver for this purpose, and that these amounts, when found due, should be settled and paid as an obligation of the company, from any funds remaining in the hands of the Receiver, after paying the preferred claims and the costs of the receivership.

That if there were any unsecured claims disputed, that these matters should be referred to the Court for final determination.

(Testimony of Joseph F. Featherstone.)

Thereupon a witness on behalf of the defendant company was called, sworn and testified for the company as follows:

TESTIMONY OF JOSEPH F. FEATHERSTONE, FOR DEFENDANT.

My name is JOSEPH F. FEATHERSTONE. I reside at Logan and have had experience in the beet sugar business for 17 years. I have been identified with the Utah-Idaho Sugar Company, the Amalgamated Sugar Company, The West Cache Sugar Company, and the Beet Growers Sugar Company. I served for the Utah-Idaho Sugar Company as Superintendent of Field Labor. And with the Amalgamated I was Superintendent of Labor and Superintendent of Agriculture, with the West Cache; I was Agricultural Superintendent first and then became General Manager and was General Manager for the Beet Growers Sugar Company —during the years 1920, 1921 and part of 1922.

While engaged in the sugar business I have become familiar with beet sugar factories and their operation, and have observed the construction of two or three factories and particularly the construction of [203—18] the West Cache factory, and I know the type of factories in this country.

The Beet Growers Sugar Company factory at Rigby is a very modern mill of its type, that is, it being a non-Steffenshouse. It has a capacity, I think, of fully 800 tons of beets in twenty-four hours. Its construction is of steel and reinforced concrete. The

(Testimony of Joseph F. Featherstone.)

machinery in it is of the most modern machinery that we have in our up-to-date sugar mills.

I have had occasion to determine the cost of construction of the factory together with the loading stations and equipment used in connection with it.

I had charge of the records and files relating to the costs of construction of the Rigby factory, and knew the cost price of material and of the contracts. The factory was not completed when I became general manager. We spent for the completion of the factory and the equipment something over $171,000 after I became general manager. The cost and construction of the factory and field equipment independent of commissions for the sale of stock was $1,350,000.00. In addition to that the company paid commissions for the sale of stock and money for the securing of contracts for the growing of beets, and for this the company paid approximately $200,000.00 additional.

I had occasion to examine the physical condition of this factory in May, 1922, with Mr. Taylor, who was then connected with the Amalgamated Sugar Company. We made an examination into the general quality of the machinery of the mill, and at the same time I became acquainted with Mr. Byer, engineer for the James J. Burke Company, and I went over the plant and equipment with him for the purpose of aiding him to prepare a report upon the replacement value of the mill and plant and supplied him with information and blue-prints of the factory and assisted him in preparing his report.

(Testimony of Joseph F. Featherstone.)

I have seen his report presented with an inventory of the property. This inventory is correct and sets forth the factory site, buildings and other property. I have also seen the inventory of the property prepared by the receiver and that is correct. [203—19]

There is usually some depreciation each year. We usually reduce the price of buildings and machinery five per cent each year, so this amount should be deducted from the report of Mr. Byer. The field equipment—auto-trucks and other equipment of this sort—we usually deduct from eight to ten per cent each year, and these deductions, in my judgment, ought to be made from the valuation placed upon the property by Mr. Byer in 1922.

From my knowledge of the actual physical condition of the plant—machinery and other property—I would think that at the present time that a reasonable value of the property would be from $950,000.00 to $1,000,000.00. That includes everything.

The property itself is located on the branch line of the Oregon Short Line Railroad Company between Idaho Falls and Ashton, Idaho, and we have what is called the "high line" railroad. It is the high line at factory, it is not tributary but is the main receiving station.

The report states that there are approximately thirty-four loading stations and that report is correct.

In 1920 we produced 79,700 bags of sugar and in up; in 1920 there was approximately 6,000 acres. In 1920 they actually harvested somewhere around

(Testimony of Joseph F. Featherstone.)

4,200 acres and I think 4,400 in 1921. There were more acres actually placed in cultivation, and there was a portion of the crop destroyed, and there were about thirty per cent of the crops destroyed by frost in the early part of June; in 1920 and 1921 there was some disease in that locality that was prevalent throughout Utah and Idaho; it was a form of rot which caused about 2,500 acres of our beets to ferment and disappear about harvest time.

In 1920 we produced 79,700 bags of sugar and in addition to that there were other by-products of molasses and things of that sort; in 1920 our net profits from the operation of the plant was somewhere around $180,000. This of course was after the paying of all expenses such as interest upon bond indebtedness, taxes and everything of that nature. The taxes were not paid, but we deducted them.

There are no other factories of this type operated by either the Utah-Idaho or the Amalgamated that is considered a better type. If there [203—20] is any better factory of this kind it is a Steffens-house. It would be more desirable. There is a plant at Delta, Utah, which might be a little better, but the Rigby plant is very well equipped with the most modern machinery, and has an auxiliary station. It is an electrically operated plant.

While general manager I made investigations as to what it would cost to increase the capacity from 800 tons to 1,000 tons. We would *have add* one more filtering units and some addition to the evapo-

(Testimony of Joseph F. Featherstone.)

rators. I think the mill is large enough to slice one thousand tons at the present time. I haven't made any investigation to determine the cost of adding these additional units. I think it would not exceed $15,000.00 or $20,000.00. The acreage is scattered over considerable territory. We purchased beets in practically all the territory that is used by the Utah-Idaho with its four factories.

We have portable loaders used in the beet fields and in order that the beets might be handled economically it was necessary to use the portable loaders, so we could install at the largest of those stations and then move them along from place to place along the railroad and pick up the beets. These loaders were the most modern type, and we were able to deliver under our system beets at the factory of the average of 700 tons a day.

I think if it was generally known that the factory was financed and equipped to carry on its operation we could secure five or six thousand acres with ease.

There are approximately 2,200 stockholders in the company. A large number (not a majority) of them are farmers and raise beets.

Beets can be shipped from Northern Utah to the Rigby factory, just as they are shipped to the Utah-Idaho plants at Idaho Falls and Sugar City from Utah.

Many of the stockholders reside in Northern Utah.

The construction of the buildings are of concrete and steel.

(Testimony of Joseph F. Featherstone.)

Cross-examination by Mr. JOHNSON.

The capacity of the factory is usually limited by the beet acreage, so that there would be no necessity of increasing the capacity of the factory unless the acreage was increased. There is ample acreage in the vicinity of the plant to furnish all of the beets required. [203—21]

The Utah-Idaho have shipped beets from Utah, that is because they did not have sufficient acreage. It isn't because there isn't sufficient acreage.

There has not been one year when the Utah-Idaho factories in that vicinity have not operated. The Utah-Idaho's Blackfoot factory was idle in 1922 and the Shelley factory of the Utah-Idaho was idle two or three years, because of lack of beets.

I am not an engineer; my experience is not entirely confined to field work; I have had charge of the operation of the factory. I was in charge of the Beet Growers' factory, also the West Cache for two years. While I have not constructed plants I have had charge of reconstruction of both the West Cache and the Rigby plant. I remodeled almost the entire Rigby plant, except moving the main engine. I never have had charge of complete construction of a factory, but have had charge of buying additional machinery and installing it. In the West Cache I increased the capacity of 150 tons a day. The first year the Rigby factory was run we had an average capacity of 300 tons a day. The first year I was there I brought the average up to 525 tons and the last year 700 tons a day, with many

(Testimony of Joseph F. Featherstone.)

days more than 800 tons. We averaged 800 tons daily for one week and could have kept that up if we could have received the beets fast enough.

I am qualified to state the cost of equipment and installation of the Rigby factory. I have made inquiries with reference to prices recently. I sent a man to see a contracting engineer and got the information from them. I know in a general way the cost of putting up a building and placing therein the equipment, and the purchasing of all outside parts.

The main building of the Rigby plant will cost, roughly speaking, $175,000.00 I have checked the cost of buildings of that kind and similar buildings at the West Cache. I have checked the prices of material, including the cast-iron castings, steel castings, pipe and labor and compared the same with prices as of April 24th, 1922, when Mr. Byer made his appraisal, to some extent, not in very great detail. [203—22]

I am not now engaged in the sugar business.

In 1920 my recollection is when I was at Rigby we had a profit of $180,000. When we began the 1920 campaign we had a deficit of about $17,000.00 from the previous campaign.

In 1920 we got $500,000 on a contract for sugar and were not required to deliver the sugar. We delivered about one carload of sugar under this contract.

The $500,000 we received was used for paying

(Testimony of Joseph F. Featherstone.)

the mortgage on the property and overdrafts, totaling approximately $422,000.00.

In computing the net profits from the operation we took into consideration the $500,000. We considered the gross income and deducted from that all expenses in order to reach the net income. We arrived at the net profit after paying all expenses of every kind and nature in connection with the operation, including interest on money, but of course did not include the $422,000, or the $350,000 mortgage that was in existence at that time. Mr. Broberg can give the figures. I think the gross profits for that year would have amounted to $266,000. Of course that year nearly all of the sugar companies lost money because sugar dropped to about $6.00 when they were paying $13.00 a ton for beets. All of the sugar factories lost money on account of sugar being carried over from 1920 to 1921. Factories lost from $500,000 to $1,000,000 apiece. But for the windfall of $500,000.00, we would have lost money. We lost the next year.

Getting the $500,000 was a good deal and by some might be called windfall and if we had a bad year they would have called it bad management. Of course getting the $500,000 put us in better shape than many of the other factories. We made our sugar and tendered it to the purchasers, but they refused to accept the delivery, because they could buy upon the market sugar much cheaper than our contract price. There ought to be a change now from the water system of delivering beets in the factory.

(Testimony of Joseph F. Featherstone.)

The sugar men and engineers figure the cost of a factory on tonnage basis, that is, a 600 ton capacity cost approximately $600,000, and an 800 ton a day factory roughly $800,000. This would be pre-war figures. Just a rough estimate. I don't know that the Smithfield factory, a 1,000 ton plant did not cost in excess of $500,000. I think the factory cost $450,000. Possibly $50,000 for dumps.

When I said this plant cost $1,350,000, these are the figures of Mr. Byer, but I checked the cost of labor on the plant and the cost of material [203—23] and found that I reached the figures of $1,350,-000 and those figures were carried on the books of the company and are a part of the records of the Company. They are not my figures.

In 1920, I think we carried the fixed assets of about $1,107,000, and since that time there has been $171,000 added to the fixed assets. This was done during 1920 when certain improvements were made on the property and new field equipment added. In 1922 there was field equipment added in the sum of $23,000, and there was $50,000, or $60,000, added to the plant during that time in new machinery, completion of the building.

In May, 1920, I think the buildings, machinery and equipment was carried on the books of $1,262,-000, this would be before the $60,000 I spoke of was added.

Cross-examination by Mr. STORY.

I was manager of the plant at the time the Receiver was appointed in October, 1922.

(Testimony of Joseph F. Featherstone.)

The fixed assets were in October, 1922, carried at $1,350,000. The plant at that time was carried at $1,189,000, real estate and trackage at $27,000; machinery and field equipment $23,000; laboratory equipment $3,000; office equipment $4,000; stationery $2,000.

While working for the Utah-Idaho and the Amalgamated Sugar Company I was field superintendent, and nothing to do with operating the factories, and had nothing to do with the accounting department of either company, but I did have an opportunity of knowing the costs of operations. I received complete classification of accounts and knew the general system of accounting maintained.

At the West Cache I had charge of accounts and operations for two years. That was the only experience I had of that kind aside from the Beet Growers Sugar Company.

I furnished Mr. Byer the information in reference to the equipment in the Rigby factory and gave him the blue-prints so that he would be enabled to value the property. I didn't do anything with respect to prices or checking up current prices. [203—24]

At the request of Mr. King yesterday I made investigations of the cost price of material, including steel and iron castings, machinery, lumber and labor and procured the prices for both years, 1923 and 1922. In this investigation I spent about 30 minutes. I conferred with the Oregon Short Line Railroad purchasing department this morning,

(Testimony of Joseph F. Featherstone.)

about 60 days ago I sent a man to see the Lynch Cannon Construction Company, who have had experience in building sugar factories.

The appraisal made by Mr. Byer was in connection with the report being submitted to Los Angeles Financiers for the purpose of either selling the plant or selling securities of the company. Mr. Byer was there a day and a half. When I said I remodeled most of the plant I meant that I did so because of original faulty construction.

Redirect Examination by Mr. KING.

The Cannon Hutchens Company have constructed a sugar factory in Japan. It is a subsidiary of Lynch Cannon. Locally they are recognized engineers. In giving the figures and cost price which I did, I was comparing the prices now with April, 1922.

At the time the company received the $500,000 as advanced price for the sale of sugar, I suggested then to the company that this money should be deposited in a large banking institution and that the indebtedness of the company would then be easily refunded and many financial difficulties avoided, but my suggestions were not followed, and if they had, the company would not have been in trouble.

Cross-examination by Mr. STORY.

The beet loaders that I referred to were called the Featherstone type and cost approximately $40,000. We had four of these and two called Deering Loaders.

End of Mr. Featherstone's testimony.

The appraisal report made by James J. Burke & Company, engineers and contractors of Salt Lake City, on the beet sugar factory and loading stations at Rigby, Idaho, was made May 24th, 1922, and gives the replacement value at that date of all the buildings and machinery of the main factory itself, together with thirty-four outside loading stations, and the report included the report of Mr. Fred G. Taylor on the capacity and quality of the machinery in the mill and the report of J. F. Featherstone on the physical condition and description of the property.

These reports show that the factory site consists of one hundred acres on which is located the modern beet sugar plant completed and first operated in 1920, together with complete subsidiary buildings. The report shows that all buildings, structures and equipment are in good repair and well taken care of.

The factory consists of one main building, with additions consisting [203—2] of sugar warehouse, machine shop, storeroom, power house, boiler house, office, locker room and laboratory, lime kiln house and concrete chimney, beet sheds, beet trestles, wagon dump with conveyor to beet sheds, railroad trestles, pulp silo, sewer and water lines, molasses tank, locomotive crane and all the sugar making machinery, together with ten four-room frame cottages, and with electric lights and running water, together with brick garage and frame house for the

field tools and equipment, together with thirty-four outlying loading stations as follows:

4 Railroad highline loading stations.

2 Inland highline loading stations with storage bins for loading trucks.

13 Portable railroad loading stations, which are served by four Featherstone and two Deer loaders.

15 Inland piling stations.

All of said stations being equipped with ten-ton wagon scales. The company possessing in all forty ten-ton wagon scales.

The size and character of buildings referred to are as follows:

MAIN BUILDING.

60′0″ wide by 208′0″ long—three and five stories high. Independent steel frame with concrete walls, concrete floors, composition roofing or wooden sheathing, wooden doors, steel sash.

SUGAR WAREHOUSE.

60′0″ wide by 160′0″ long—one story high, 23′1½″ from floor to bottom chords of steel trusses. Steel trusses and purline resting on concrete walls, concrete floor, composition roofing on concrete roof slab, wooden doors, steel sash.

MACHINE SHOP AND STOREROOM.

60′0″ wide by 39′0″ long—two stories high. Construction similar to main building.

POWER HOUSE.

45′4″ wide by 39′0″ long—one story high with basement. Steel trusses and purline resting on

concrete walls. Concrete floors, composition roofing on concrete roof slab, wooden doors, steel sash.

BOILER HOUSE.

45′4″ wide by 112′6″ long—one story high. Steel rafters resting on concrete outside walls, interior steel columns, steel framing for supporting steel coal bunkers, composition roofing on concrete roof slab, wooden doors, steel sash.

OFFICE LOCKER ROOM AND LABORATORY.

20′0″ wide by 39′0″ long—three stories high. Construction similar to main building. [203—26]

LIME KILN BUILDING.

48′0″ wide by 48′0″ long. Lower portion concrete walls, concrete floors, steel roof framing. Upper portion steel frame covered with corrugated steel. This is a separate building apart from the factory buildings proper. Capacity of Belgiam Lime Kiln is 3048.9 cubic feet.

REINFORCED CONCRETE CHIMNEY.

8′6″ inside diameter by 210′0″ high.

BEET SHEDS, BEET TRESTLES AND WAGON DUMP WITH INCLINED CONVEYOR.

139′6″ wide by 400′0″ long. Standard wood construction concrete flumes, railroad highline, wagon dump with inclined conveyor, steel cross conveyor bridge. Capacity 8000 tons of beets.

PULP SILO.

125′0″ wide by 375′0″ long. Standard wood construction. Capacity level full 12,500 tons of pulp.

SEWERS AND WATER LINES.

A pipe line conveys water from the canal to the factory and a 24″ concrete sewer carries away the waste material.

MOLASSES TANK.

35′ diameter by 29′ high—steel—capacity 1231 tons.

LOCOMOTIVE CRANE.

Orton and Steinbremer—15 ton capacity—60′ boom.

GARAGE, IMPLEMENT AND STORE HOUSE.

Brick garage of size to accommodate six trucks, six trailers and six automobiles. Implement house and outside store house of frame construction for tools and field equipment during inter-campaign.

OUTSIDE LOADING STATIONS.

The location of the thirty-four outside loading stations with respect to the main factory is shown on the attached map.

The appraisal value based on replacement value of date of May 24th, 1922, is as follows: [203—27]

Factory site—10 acres	$ 10,000.00
Main factory building	149,300.00
Sugar warehouse	53,600.00
Machine shop and store room	14,000.00
Power house	11,900.00
Boiler house	30,200.00
Office room, Locker room and Lab.	4,200.00
Lime Kiln Building	16,100.00
Reinforced concrete chimney	10,500.00
Beet sheds complete	74,600.00

Pulp silo	11,800.00
Sewers and water lines	13,300.00
Molasses tank	9,400.00
Locomotive crane complete with bucket, etc.	12,500.00
Garage, Implement and storehouse	4,600.00
Boiler House Equipment Installed	103,700.00
Power House Equipment Installed	62,500.00
Lime House Equipment Installed	14,500.00
Warehouse Equipment Installed	4,500.00
Machine Shop and Storeroom Equipment Installed	19,500.00
Main Sugar Mill Equipment Installed	590,000.00
Ten Frame Cottages	20,000.00
Farm Tools, drills, etc.	15,000.00
Portable Beet Loaders	35,000.00
R. R. and Inland highlines	30,000.00
Scales and scale houses	12,500.00
6 3½-ton trucks	
6 5-ton Troy Trailers, valued at	25,000.00
1 Quad Truck	
Total	$1,358,200.00

The evidence of the valuation of the property having been submitted, the Court stated, "some matters I shall have to take under advisement for two or three days, and it will probably take that long to form a decree. You may prepare a form of decree, Mr. Story, the regular form of foreclosure decree, leaving blank such matters as I have not passed upon. Some of them, I cannot pass on just at the present time. The decree will re-

serve authority to fix an upset price, and, as is customary, reserve the power to reject any bid that may be made for the property. I assume from what has been said here this morning, that it is agreeable to all that this decree shall provide that the property be sold as a unit, regardless of the fact that some of the property is purely personal, and some has a very doubtful status, and that if redeemed it shall be redeemed as a unit. This statement was agreed to by counsel for all parties. [203—28]

The COURT.—The sale will have to be made subject to the lease. If anyone has any provision as to any specific provision to go into this decree, if anything occurs to you from time to time before Mr. Storey formulates the decree, you might suggest the matter to him and ask for a provision covering the point you have in mind. Of course I do not want the decree enlarged beyond necessity. So far as the mode of sale is concerned that is fixed by statute anyway, and the decree may simply follow the statute, but there are other things that may occur to you. I should like to have the form of decree at the earliest possible moment. I shall at once upon my return to Boise give attention to unfinished matters. Are there any other suggestions as to the decree?

Mr. JOHNSON.—Some suggestion has been made as to the method of determining the amount of the unsecured—

Mr. KING.—That isn't in the decree.

Mr. JOHNSON.—I am assuming that is agreeable.

The COURT.—We will go into that in a moment. That does suggest the inquiry as to whether any provision ought to go into the decree touching the right of unsecured creditors to redeem. I think someone made the suggestion this morning. If they are to have such a right, wouldn't it have to be conferred upon or reserved to them in some way by the decree?

Mr. RICHARDS.—Unless they are given the status of judgment creditors the statute gives them the right.

The COURT.—That might be hazardous. It would be better to put it in the decree by the consent of the parties, so that perhaps you had better provide that any one or all who are now secured creditors may redeem within the year, that is, anyone who is recognized as a creditor by the order of this court allowing the claim. We shall have to have an order fixing the amounts of the several claims.

Mr. KING.—I think there ought not to be any judgment for the unsecured claims at this time, but there would be no serious objection on the part of the company that they may redeem within a given period, and if they do not exercise the right of redemption the unsecured creditors may thereafter redeem. In other words, that [203—29] would be subject to the right—

The COURT.—I am not quite sure whether I can do that. I am trying to let the statute cover

the whole subject of redemption. You have a year under the statute. If you redeem at all it would be within a year. How could I limit it to six or seven or eight months?

Mr. HENDERSON (Of Counsel for Defendant). Of course we could waive in favor of other parties.

The COURT.—I think perhaps the decree had better fix the status of any general creditor whose right is declared by the order as that of a lienholder. I do not recall the exact language of the State statute. Perhaps you had better have that before you when you draw the decree, Mr. Storey, and try to fix the status the same as any other redemptioner.

Now are there any other suggestions in regard to the decree. If not, we will pass from that for the moment. [203—30]

Thereupon provision was made for the prompt auditing and allowance of numerous claims of general creditors, most of which had been presented to and filed with the Receiver; and after further conference upon the subject of handling the property for the ensuing year an order was made authorizing the Receiver promptly to take steps for leasing of the property for the year 1924 and 1925. Whereupon the court at Pocatello adjourned. * * * [203—31]

Even with this incentive to bidders, the Utah-Idaho Sugar Company was, in fact, the only bidder at the sale.

The foregoing, consisting of thirty-three typewritten pages, inclusive of this sheet, is hereby settled and allowed as defendants' statement of

facts upon appeal from order for Receiver's Sale and order confirming such sale.

FRANK S. DIETRICH,
Judge.

September 13, 1924.

[Endorsed]: Filed Sept. 16, 1924. W. D. McReynolds, Clerk. By M. Franklin, Deputy. [203—33]

United States of America,
District of Idaho,—ss.

I, W. D. McReynolds, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing copy of statement of facts on defendant's appeal from order for Receiver's sale and order confirming such sale in the cause of Columbia Trust Company, as Trustee, plaintiff, vs. Beet Growers Sugar Company, a Corporation, et al., defendants, and E. D. Hashimoto, intervenor, and also A. V. Scott, Receiver of the Beet Growers Sugar Company, No. 364, Eastern Division has been by me compared with the original, and that it is a correct transcript therefrom and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof, I have set my hand and affixed the seal of said Court in said District this 17th day of September, 1924.

[Seal] W. D. McREYNOLDS,
Clerk.
By M. Franklin,
Deputy.

[Endorsed]: No. 4249. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 20, 1924. F. D. Monckton, Clerk. [203—34]

[Title of Court and Cause.]

RECEIPT OF COPY OF PETITION, ETC.

We hereby acknowledge receipt of copy of the petition for an appeal filed herein, copy of assignments of error, filed herein, together with copy of bond on appeal and copy of citation issued by the Court.

Dated this 31st day of March, A. D. 1924.

WM. STOREY, Jr.,
Solicitors for Plaintiff.

A. V. SCOTT,
Receiver.

DEY, HOPPAUGH & MARK,
Solicitors for Intervenor.

R. W. YOUNG,
By W. T. PYPER,
Solicitors for Utah-Idaho Sugar Company.

[Endorsed]: Filed April 2, 1924. W. D. McReynolds, Clerk. [204]

[Title of Court and Cause.]

PETITION FOR APPEAL.

Filed —— A. D. 1924, in the District Court of the United States in and for the District of Idaho, Eastern Division.

To the Honorable FRANK S. DIETRICH, District Judge of the United States District Court, in and for the District of Idaho, Eastern Division:

The above-named defendant, Beet Growers Sugar Company feeling itself aggrieved by the decree made and entered in this cause on the 25th day of January, 1924, and entitled in this cause "Order for Sale by Receiver" as amended and supplemented by the "Supplemental Order of Sale" entered herein by the Court on the 7th day of February, 1924, and the "Order Confirming Sale of Real and Personal Property" made and entered herein on the 15th day of March, 1924, does hereby appeal from said decree and orders to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and it prays that its appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree and orders were based, duly authenticated, may be sent to the [205] United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California.

And your petitioner further prays that the proper order touching the security to be required of it to perfect its appeal be made and desiring to supersede the execution of the decree, petitioner here tenders bond in such amount as the Court may re-

quire for such purpose, and prays that with the allowance of the appeal a supersedeas be issued.

SAMUEL A. KING,
MARIONEAUX, KING & SCHULDER,
HERBERT R. MacMILLAN,
MARSHALL MacMILLAN & CROW,
H. H. HENDERSON,

Solicitors.

The appeal is allowed. Bond for costs fixed at $200.00.

FRANK S. DIETRICH,
Judge.

March 29, 1924.

[Endorsed]: Filed March 29, 1924. W. D. McReynolds, Clerk. [206]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

Now, on the 30th day of March, 1924, comes the defendant Beet Growers Sugar Company, a corporation, by its solicitor Mr. S. A. King, and says that the decree entered in the above-entitled cause on the 25th day of January, 1924, entitled "Order for Sale by Receiver," as amended and supplemented by the "Supplemental Order of Sale" entered herein on February 7, 1924, and the order confirming the sale, ordered as aforesaid, entered on the 15th day of March, 1924, are erroneous and injurious to the defendant.

ASSIGNMENT OF ERROR No. 1.

For that the Court erred in its order of the 25th day of January, 1924, in requiring appellant's right of redemption to be exercised within six months following the date of the approval of sale.

II.

For that the Court erred in its said order of sale [207] in providing that the appellant company should have the exclusive right of redemption during only the first three months following date of the approval of sale, and in limiting its right to redeem during the three months remaining after the expiration of the first three months following the date of the approval of the sale, to a prior right during the latter three months period of said six months period, of an organization of the preferred stockholders, as set forth in said order of sale.

III.

The Court erred in failing to provide in said order that appellant should have and be allowed a period of one year following the date of the approval of sale in which to redeem from said sale.

IV.

For that the Court erred in requiring by the said order of sale that as a condition to the right of redemption granted by said order, appellant should pay, in addition to the purchase price paid by the purchaser at the sale, with interest thereon at the rate of ten per cent, and additional penal sum of $15,000.00.

V.

For that the Court erred in giving to the said, or

any, association of preferred stockholders, any right of redemption prior to the expiration of one year following the date of the approval of the sale.

VI.

For that the Court erred in refusing to pass upon the merits of said requests to postpone the date of sale, as prayed for by appellant in its petition of March 1st, 1924, and referring said request for a continuance to the receiver.

VII.

For that the Court erred in confirming the said sale [208] for the following reasons:

(a) For that it was made to appear by the record that after the entry of order of sale herein, of the 25th day of January, 1924, the property of the defendant company so ordered to be sold, had been by order of the Court leased to the Utah-Idaho Sugar Company at a fixed rental for the year 1924 of $115,000.00, and by giving to the property so ordered sold, a value of approximately $1,150,000.00.

(b) For that it appears by the record that said sum of $115,000.00 was sufficient to pay all of the outstanding Receiver's certificates and the taxes and expenses of said receivership incurred up to date and to accrue for the year 1924, and would leave a balance of approximately $75,000.00, applicable to the payment of interest and the reduction of the company's debts.

(c) For that it appears by the record that the fair and reasonable market value of the property sold, was a sum in excess of $1,150,000.00, and that the price realized upon said sale results in the loss

of ninety per cent of the money invested by the stockholders of appellant in said property.

(d) For that it was made to appear by the record that the purchaser at said sale was the Utah-Idaho Sugar Company, a corporation, and it was further made to appear by the record namely, by appellant's objection to the confirmation of said sale, that the Utah-Idaho Sugar Company was incompetent to purchase said property at said sale, for that heretofore a certain action was instituted and commenced by the Federal Trade Commission of the United States of America against said Utah-Idaho Sugar Company and other defendants, which said action has Docket No. 303, said proceedings being under Section 5 of the Act of September 26, 1914, known as the Federal Trade Commission Act, and passed by the Congress of the United States of America; [209] that the said Federal Trade Commission issued and served its complaint herein and the said Utah-Idaho Sugar Company filed its answer in said proceedings, admitting certain of the allegations of said complaint and denying certain others thereof; that thereafter hearings were had before said Commission, testimony was taken, arguments were made, and thereafter findings of fact and conclusions were duly made, rendered and entered by the said Federal Trade Commission on the 3d day of October, 1923, and on said date a judgment and restraining order was issued in said proceeding against the said Utah-Idaho Sugar Company and other defendants therein, and in and by the said judgment, it was found and decided that

the said Utah-Idaho Sugar Company being then and there engaged in interstate commerce, in shipping and selling beet sugar throughout the United States of America, undertook to prevent the successful operation of the said Beet Growers Sugar Company and the erection of its factory, by making false and unfair and misleading statements to farmers, to induce them to refuse to raise beets for appellant company, and to stockholders of appellant company and persons intending to become stockholders thereof, to the effect that the appellant company would be unable to secure the necessary funds to purchase machinery and building materials for its factory, and that the land in the vicinity of said factory was unfit for the production of sugar beets, and that it would be unable to pay for any sugar beets which farmers might produce for it, and that the promoters of appellant company were dishonest and that they were engaged in a dangerous and dishonest promotion; and that said Utah-Idaho Sugar Company had made false and misleading statements to the effect that this appellant company was insolvent and in the hands of bad management and that its enterprise would be unsuccessful and that by said means it undertook to and did succeed in inducing prospective purchasers [210] of stock of appellant company to refrain from investing therein and succeeded in impairing the financial standing and reputation for integrity of the officers of appellant company and that the object of said Utah-Idaho Sugar Company in making said false and misleading statements against appellant's enterprise and against the character of its officers, was to elimi-

nate appellant from the business of manufacturing sugar and shipping and selling the same in interstate commerce. And said tribunal thereupon ordered, adjudged and decreed that the said Utah-Idaho Sugar Company should forever cease and desist from conspiring or combining with others named in the said decree, to prevent the establishment and building and successful operation of appellant's sugar factory at Rigby, Idaho, and from hindering, forestalling, obstructing and preventing appellant from engaging in the purchase of sugar beets and in the manufacture and sale of refined beet sugar in interstate commerce.

And by the said decree the said tribunal further adjudged and decreed, that the said Utah-Idaho Sugar Company, should cease and desist from using its power and influence so as to discourage competitors and prospective competitors, including this appellant from engaging in the purchase of sugar beets and the manufacture and sale of refined beet sugar in interstate commerce, and from using its financial power and influence to purchase land and erect factories in the territory where competitors or prospective competitors intend or shall undertake to start in the business of purchasing sugar beets and manufacturing and selling refined beet sugar in interstate commerce, when such purchases and erections are not done in good faith and for no other purpose than to forestall, obstruct and prevent competitors and prospective competitors from engaging in the business of purchasing sugar beets and of [211] manufacturing and selling beet sugar in interstate commerce.

And it was further made to appear by appellant's said petition objecting to said confirmation, that the inability of this appellant to pay off and discharge the indebtedness, for the payment of which the sale of its property was ordered by the Court, was due to the said misconduct of the said Utah-Idaho Sugar Company, in violation of the provisions of said Act of September 26th, 1914, known as the Federal Trade Commission Act, and particularly in violation of Section 5 of said Act, and that the financial embarrassments which led to said foreclosure were caused by misconduct upon the part of said Utah-Idaho Sugar Company, which by the said judgment and decree of said tribunal, it was ordered and required to cease and desist from.

WHEREFORE, this appellant prays that said orders and decrees of the said District Court be reversed and the said sale be vacated and annulled and that in any order hereafter entered in this cause in said District Court for the sale of said property, this appellant shall be allowed the exclusive right of redemption for the period of one year from the date of confirmation of sale, and that said Utah-Idaho Sugar Company shall not be permitted at any such sale to become a purchaser, and that appellant have its costs in said District Court and upon appeal.

SAMUEL A. KING,
MARIONEAUX, KING & SCHULDER,
HERBERT R. MacMILLAN,
MARSHALL, MacMILLAN & CROW,
H. H. HENDERSON,
Solicitors for Appellants.

[Endorsed]: Filed March 29, 1924. W. D. McReynolds, Clerk. [212]

"Bond on appeal usual form in the sum of $200.00 executed and filed in conformity with the order of the Court." [213—214]

[Title of Court and Cause.]

WRIT OF ERROR.

The President of the United States, to the Honorable Judge of the District Court of the United States, for the District of Idaho, Eastern Division, GREETING:

Because, in the records and proceedings as also in the rendition of decree entered in the above-entitled cause on the 25th day of January, 1924, entitled "Order For Sale by Receiver," as amended and supplemented by the "Supplemental Order of Sale" entered herein on February 7, 1924, and the order confirming sale, ordered as aforesaid, entered on the 15th day of March, 1924, manifest error has happened to the great damage of the Beet Growers Sugar Company, plaintiff in error, as by their complaint appears.

We being willing that error, if any hath happened, shall be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf duly command you, if judgment be therein given, that then under your seal, distinctly and openly you send the records and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Judicial

Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date of this writ in the said Circuit Court of [215] Appeals, to be then and there held, that the records and proceedings aforesaid, being inspected, this said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States this 29th day of March, 1924.

[Seal] W. D. McREYNOLDS,
Clerk of the United States District Court for the District of Idaho, Eastern Division.

[Endorsed]: U. S. District Court, District of Idaho. Filed Mar. 29, 1924. W. D. McReynolds, Clerk. [216]

[Title of Court and Cause.]

CITATION ON WRIT OF ERROR.

United States of America to Columbia Trust Company, as Trustee, a Corporation, Plaintiff, E. D. Hashimoto, Intervenor, and A. V. Scott, Receiver, GREETINGS:

You are hereby notified that in a certain case in equity in the United States District Court in and for the District of Idaho, wherein Columbia Trust Company, a corporation, is complainant, E. D. Hashimoto, is intervenor, A. V. Scott, is Receiver,

and Beet Growers Sugar Company, a corporation, are defendants, an appeal has been allowed the Beet Growers Sugar Company, a corporation, defendants therein to the United States Circuit Court of Appeals, Ninth Circuit. You are hereby cited and admonished to be and appear in said court at San Francisco, State of California, thirty days after the date of this citation, to show cause, if any there be, why the orders and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness the Honorable FRANK S. DIETRICH, Judge of the United States District Court for the District of Idaho, this the 29th day of March, A. D. 1924.

FRANK S. DIETRICH,
United States District Judge.

[Seal] Attest: W. D. McREYNOLDS,
Clerk.

[Endorsed]: U. S. District Court, District of Idaho. Filed Apr. 2, 1924. W. D. McReynolds, Clerk. [217]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of Said Court:

Sir: Please incorporate the following pleadings, orders, minute entries and statements of evidence in the transcript on appeal in the above-entitled cause:

1. Complaint in equity, with trust deed attached.

2. Amendment to bill of complaint.
3. Defendant's answer to plaintiff's complaint.
4. Order appointing Receiver.
5. Answer of Beet Growers Sugar Company to amendment to bill of complaint.
6. Supplemental bill of complaint.
7. Complaint in intervention of E. D. Hashimoto.
8. Order permitting complaint in intervention to be filed.
9. Petition of Receiver for authority to lease property.

9–a. Order to take complaint in intervention *pro confesso.* [218]

10. Petition of intervenor to sell all of the property of the defendant company without redemption.
11. Defendant's answer to petition of intervenor.

11–a. Petition of intervenor to extend powers of Receiver.

12. Order of Court extending powers of Receiver.

12–a. Order of Court re claims dated Apr. 17, 1923.

13. Order of Court authorizing Receiver to solicit bids for lease of property.
14. Memorandum decision under date of December 28, 1923.
15. Order of January 8, authorizing Receiver to solicit bids for the lease of the property for the year 1924.
16. Order of January 8, authorizing Receiver and Auditor of company to determine amount of unsecured claims.

17. Memorandum order of sale of property by Receiver.
18. Order of sale by Receiver.
19. Supplemental order of sale.
20. Objections by defendant to proposed decree.
21. Objections of Beet Growers Sugar Company to proposed order of sale by Receiver.
22. Copy of lease of property for year 1924.
23. Petition and objections of defendant asking the Court to postpone sale of property to July 1st, and to fix proper period for redemption.
24. Order of the Court in relation to postponement of sale.
25. Order fixing time for hearing application to approve sale.
26. Petition and objections filed by defendant, Beet Growers Sugar Company to report of Receiver asking confirmation of sale of property.
27. Order confirming sale of property.
28. Order authorizing Receiver to disburse money received from sale of property. [219]

29. Minute entries of the Clerk of the court in relation to the ordering of sale of property and objections made to orders of sale and to confirmation of the same, together with exceptions entered by defendant.

30. Statement of evidence given before the Court in respect to value of property and sale of the same, received January 7th and 8th, 1924, together with petition for appeal, assignments of error, order al-

lowing appeals, undertaking on appeal, together with receipts showing service of papers on appeal.

SAMUEL A. KING,
MARIONEAUX, KING & SCHULDER,
Attorneys for Defendant, Beet Growers Sugar Company.

Dated this 25th day of April, 1924.

Received copy of the foregoing praecipe this 26th day of April, 1924.

WM. STORY, Jr.,
Attorney for Plaintiff.
DEY, HOPPAUGH & MARK,
Attorneys for Intervenor.
_____,
Attorneys for A. B. Scott, Receiver.

[Endorsed]: U. S. District Court, District of Idaho. Filed Apr. 28, 1924. W. D. McReynolds, Clerk. By M. Franklin, Deputy. [220]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages, numbered from 1 to 221, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above-entitled cause, and with the exception of the bill of exceptions which will be forwarded at a later date upon its settlement by the

Court, constitutes the transcript on appeal, to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the praecipe of the appellant, a copy of which is included herein.

I further certify that the cost of the record, as now constituted, amounts to the sum of $44.00, and that the said amount has been paid by the appellant.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of this court, on the 30th day of April, 1924.

[Seal] W. D. McREYNOLDS,
Clerk U. S. District Court. [221]

[Endorsed]: No. 4249. United States Circuit Court of Appeals for the Ninth Circuit. Beet Growers Sugar Company, a Corporation, Appellant, vs. Columbia Trust Company, a Corporation, as Trustee, E. D. Hashimoto, Intervenor, and A. V. Scott, Receiver, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Idaho, Eastern Division.

Filed May 2, 1924.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

September 16, 1924.

DESIGNATION OF PARTS OF RECORD TO BE OMITTED IN PRINTING RECORD.

Clerk Circuit Court of Appeals,
San Francisco, Calif.

Dear Sir:

In re: Beet Growers Sugar Company.

In the preparation of the Record for the printer, you will leave out the following portions of the Record:

1. Omit paragraph 4 of the Complaint on pages 2 and 3, and in lieu thereof add, "Defendant, Beet Growers Sugar Company executed its Deed of Trust and mortgage covering all its property, both real and personal for the security of its bonds."

2. Omit paragraph "Va" on page 5.

3. Omit paragraph 6.

4. Omit page 6 and that portion of page 7 relating to page 6.

5. Omit all of pages 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24, and add in lieu of these pages, "copy of form of bonds authorized and description of property mortgaged."

6. Omit all of pages 31–2, and in lieu of these pages simply state "Duties of Trustee defined."

7. Omit pages 35 and 36, adding in lieu thereof, "Duly acknowledged."

8. Omit page 138, adding in lieu thereof: "Bonds in hands of claimants, $337,345.35."

9. Omit page 145.

10. Omit all of pages 149, 150, 151, 152, 153, 154, 155 and 156 and add in lieu of this. "Copy of lease

executed to Utah-Idaho Sugar Company for year beginning August 1, 1922, to March 1, 1925, amount paid for lease $115,000."

11. Omit page 176 and add in lieu thereof: "Petition duly verified by George E. Sanders March 13, 1924."

12. Omit page 213 and 214 and add in lieu thereof, "Bond on appeal usual form in the sum of $200.00 executed and filed in conformity with the order of the Court."

13. In addition to the foregoing, after giving title to all pleadings aside from first one, add in lieu thereof, "Title, Court and Cause."

14. Omit all the verifications adding in lieu thereof, "Duly verified."

15. Omit copying Order appointing Receiver, adding in lieu thereof "Order appointing Receiver in usual form."

16. Omit order permitting Complaint in Intervention to be filed, adding in lieu thereof, "Order permitting Complaint in Intervention to be filed granted."

17. Omit petition of Receiver for authority to lease property, adding in lieu thereof, "Petition of Receiver asking authority to lease property filed."

18. Omit order of Court authorizing Receiver to solicit bids for property adding in lieu thereof "Order issued authorizing Receiver to solicit bids for lease of property."

19. Omit order approving lease to E. D. Hashimoto for 1923–4, adding in lieu thereof "Order approving lease to E. D. Hashimoto granted."

20. Omit order of January 8th, authorizing Receiver to solicit bids for lease of property for 1924, adding in lieu thereof, "Order issued January 8th authorizing Receiver to solicit bids for lease of property for year 1924."

21. Omit order of January 8th authorizing Receiver and Auditor of Company to determine amount of unsecured claims, adding in lieu thereof, "Order issued authorizing Receiver and Auditor to determin*ing* amount of unsecured claims."

22. From the Statement of Facts which you will hereafter receive, on the first page beginning "Be it remembered that" on the first line, then omit the balance of page 1, all of page 2, all of page 3, all of page 4 and down to and commencing with the words, "On October 18th, 1923" on page 5, so that it will read, "Be it remembered that on October 18, 1923, appellant filed, etc."

23. We are not familiar with the exact paging of the latter portions of the Statement of Facts, but you will find on the third or fourth page from the end of the Statements of Facts a paragraph ending, "Whereupon the Court at Pocatello adjourned," After the word "adjourned" you will omit the balance of that page, all of the succeeding page and all of the next page down to the words, "Even with this incentive to bidders the Utah-Idaho Sugar Company was in fact the only bidders in the sale."

In your Statement of Facts, where these portions are omitted, it will be just as well to put in an asterisk or two showing that portions of the Statement have been omitted, but they are not essential to the

questions to be determined and for that reason we have omitted them.

Yours very respectfully,

KING & SCHULDER.

By KING.

SAK/NR.

[Endorsed]: No. 4249. United States Circuit Court of Appeals for the 9th Circuit. Beet Growers Sugar Company, a Corporation, vs. Columbia Trust Company, a Corporation, et al., etc. Designation of Parts of Record to be Omitted in Printing Record. Filed Sep. 17, 1924. F. D. Monckton, Clerk.

No. 4249

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BEET GROWERS SUGAR COMPANY,
(a corporation), Defendant,
Plaintiff in Error

vs.

COLUMBIA TRUST COMPANY,
(a Corporation), Trustee, Plaintiff,
and
E. D. HASHIMOTO, Intervenor
and
A. V. SCOTT, Receiver,
Defendants in Error

REPLY BRIEF OF PLAINTIFF IN ERROR

SAMUEL A. KING,
RUSSEL G. SCHULDER,
THOMAS MARIONEAUX,
Attorneys for Plaintiff in Error.

No. 4249

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and
A. V. SCOTT, Receiver,
Defendants in Error

REPLY BRIEF OF PLAINTIFF IN ERROR

The brief filed by the Receiver contains several statements not warranted by the record and many of the conclusions drawn therefrom are erroneous. The cases cited, either do not uphold the contention of counsel for the appellee, or are easily distinguished from those cited by the appellant.

We desire briefly to direct the court's attention to these matters.

CONCERNING APPELLEE'S STATEMENT OF FACTS.

It is stated at Page 1 of the Appellee brief that "the complaint prayed for the appointment of a Receiver. In its answer the defendant consented to the appointment of a receiver." This statement is untrue. The answer of the Beet Growers Sugar Company prays "that the complaint herein be dismissed and that the plaintiff go hence without judgment; that the defendant have and recover its costs in this behalf expended, and that such decree be had in this case as will properly conserve and protect the interests of this answering defendant and its unsecured creditors." (Record, p. 31.)

It is true that the Trust Deed executed by the company provided that upon filing of a bill in equity the Trustee "shall be entitled to the appointment of the receiver of the property mortgaged and of the earnings, tolls, income, revenue, issues and profits thereof, with such power as the Court making such appointment shall confer." (Record, p. 19.)

Upon the complaint of the Trustee having been filed, the Court held that default had been made by the company and that the plaintiff was entitled to the appointment of a receiver. Notwithstanding the provisions contained in the trust deed, giving to the Trustee the right to ask for a receiver under certain conditions, the company did not waive its statutory right of redemption, nor did it authorize the receiver or the Court to order its property sold in the event of foreclosure without the equity of redemption.

The trust deed provides that when default is made

that the Trustee shall have the right to "declare the principal of all bonds secured and then outstanding to be and they shall thereupon immediately become due and payable, anything contained in the bonds or herein to the contrary notwithstanding, and *may proceed to foreclose this indenture and to enforce by legal process the payment of said bonds and coupons by and against the company.*" (Record, p. 16.) This gives the right of sale by foreclosure, but does not authorize a receiver's sale without this right.

In pretending to quote from the complaint in intervention it is stated on page 4 of the brief that "it was further alleged that since the appointment of the receiver that the board of directors of the corporation had ceased to function," and the impression is left by this statement that the corporation had in fact ceased its operations. This, however, is untrue. After the appointment of the receiver the officers of the company being temporarily out of funds and the receiver having failed to pay the corporation tax when due, the charter of the company temporarily lapsed, but the officers of the company on learning of the failure of the receiver to pay the tax, immediately paid to the Secretary of the State of Idaho the tax, and a certificate was promptly issued in accordance with the laws of that state, reinstating the corporation.

That was the basis of this charge, and while it was contended by the intervenor that the corporation had ceased to function and that the State of Idaho had no right or authority to reinstate the corporation, Judge Dietrich promptly overruled the objection urged by the

intervenor, and held that the company was in existence, and at all times thereafter recognized the company and the efforts of its officials in endeavoring to preserve the corporate assets, pay its obligations, and redeem its property. So that the suggestion made that the corporation "had ceased to function" comes with poor grace from the receiver at this time, and has nothing whatever to do with the matters in issue.

Again, the brief quotes a paragraph from the complaint in intervention to the effect that a portion of the bonds of the company had been "wrongfully taken by officers of the company, who hold the same to protect and secure their personal claims against the defendant."

Why this matter should be injected in the proceedings at this time, we are unable to understand. No evidence was ever offered in support of this allegation and no finding was ever made sustaining it, but, upon the contrary, all the acts of the officers of the corporation were by the Court upheld.

It is true that it was ordered that the complaint in intervention be taken *pro confesso,* but this was done through inadvertence and the Court immediately thereafter permitted and allowed the defendant to file its answer to the petition of the intervenor, wherein he asked that all of the assets of the company be sold "as a single unit, but sold without right of redemption." (Record, p. 61.)

The answer denied "that the property of the defendant described in the trust deed under foreclosure was in any sense a public or a quasi-public utility or anything more than a private enterprise." (Record, p. 61.)

The answer set forth fully the nature of the corporation, the purposes for which it was organized, that it had 2,173 stockholders, 72% of whom were farmers; that the total amount of its preferred capital stock issued and outstanding for which cash had been paid was $1,160,050. That efforts were being made to re-finance the corporation; that while this property was worth more than $1,333,200., that the total indebtedness of the company did not exceed $600,000. and that the acts of the intervenor was for the sole purpose of hindering and preventing the refinancing of the company and the payment of its obligations, and asked that the order sought by the intervenor be denied and that the petition be dismissed.

In other words at the first suggestion of the Intervenor, that the company's property be sold without the right of redemption, the company filed an answer and made proper objections thereto. (Record, pp. 61 to 74.)

As soon as the Trustee filed an amendment to its complaint asking for a decree authorizing the sale of the company's property without the right of redemption, (p. 26), the defendant company immediately filed its answer to the amendment to the bill of complaint, and prayed that the relief sought by the plaintiff under its amendment to the bill of complaint, to-wit: that "the sale of the property of the defendant without the right of redemption" be denied, and that in case of judgment or foreclosure that the decree and order provide for the right of redemption pursuant to the laws of the State of Idaho." (Record, p. 34.)

We direct the Court's attention to these matters, simply for the purpose of showing that the appellant was

at all times insisting upon its right of redemption guaranteed under the laws of Idaho.

Counsel, on page 7 of their brief, quote a part of a statement made by the Court under date of December 28, 1923, wherein it is stated—

> "that it is apparent that the common stockholders and the company, in so far as it represents only the common stockholders, have no real interest in the question of whether the sale be made with or without redemption."

This is from a memorandum decision of the Court; in other words, a mere suggestion as to what the Court's views were. But the quotation as given is wholly misleading and was injected into the brief undoubtedly for the purpose of conveying the idea that Judge Dietrich had at that time decided against allowing a sale of the property with the right of redemption. The Court then had under consideration various claims presented against the company, as well as the question of the sale of the property, and in discussing generally the conditions of the company, the standing of the preferred and common stockholders, and the amount of the unsecured claims, finally comes to a discussion as to "whether or not the property should be sold with redemption," and said this question has

> "given rise to a very earnest controversy, and upon it elaborate arguments have been submitted. All of the property, real and personal, purports to be covered by the Trust Deed, and as all of it is used together to carry on a single enterprise, and substantially all of it is essential to the successful operation of the plant. Comparatively speaking, the personal property is of small value."

It is then suggested that the Trustee and intervenor urged a sale without redemption and then directed attention to the fact that the unsecured creditors were not directly represented. The Court then continues:

> "The Sugar Company strongly opposes such a sale and argues, in the first place, that it cannot be legally made."

This is followed by a discussion of the value of the property and that if the property did not sell for an amount greater than that suggested, that then it would be "apparent that the common stockholders, and the company in so far as it represents only the common stockholders, have no real interest in the question of whether the sale is made with or without redemption."

The Court, however, not being satisfied with the evidence then before it, concluded that before it could intelligently draft a proper order of sale that he deemed it necessary to have a conference with counsel and a supplemental hearing. Such a conference and hearing was accordingly fixed for January 7, 1924, at 2 p. m., at the courtroom in Pocatello. (Record, p. 94.)

It will thus be observed that at the time of the announced memorandum decision, under date of December 28, 1923, the Court had not definitely decided the question of sale, and fixed a supplemental hearing for January 7th. Up until this time the trustee and intervenor had been urging the sale of the property without the right of redemption.

On January 7th, however, additional evidence was taken, at which time the trustee and intervenor still collusively acting together against the interests of the

company, called as a witness H. A. Benning. (Record, p. 225). He was formerly connected with the Amalgamated Sugar Company (one of the companies found guilty of conspiracy against the Beet Growers Sugar Company by the Federal Trade Commission), but at that time was interested in the lease upon the Beet Growers Sugar Company's property. He attempted to minimize the value of the property and claimed that it was worth only from $450,000 to $500,000.

Yet upon cross examination he admitted that he did not know what the plant cost or the number of acres of beets the company was able to contract for. It was conclusively demonstrated that this witness had no actual knowledge of the real value of the property.

The supplemental hearing was not concluded on January 7th, but was resumed January 8th. (Record, p. 230.)

At the time Mr. Story, who had represented the trustee in all of the proceedings, stated:

> "Your honor, I would like to make a suggestion or two. Since yesterday's session I have given the matter a good deal of thought. * * * * I suggested to Your Honor yesterday that I thought under the facts as you had found them in your memorandum opinion, even a sale under foreclosure would give the plaintiff the right to have the sale made without redemption. So far as we are concerned, we feel that the immediate sale of the property is of very much more importance than the question of redemption. If the property can be sold under foreclosure at this time without endangering the possibility of the sale being voided by fixing some large upset price, we would be very glad to have it sold in foreclosure with the equity of redemption allowed by law, and *we withdraw our request for the sale without redemption.* (Record, p. 231.)

It must be remembered that the trustee began the foreclosure proceedings, asked for the appointment of a receiver, and later petitioned to have the property sold without the equity of redemption. Before, however, such a decree was entered, the trustee withdrew his request for the sale without redemption. In other words, in open court, the trustee voluntarily changed the prayer of his petition and consented to the sale of the property with the equity of redemption provided by the laws of Idaho.

It must be remembered that it was the trustee that was enforcing its rights under the trust deed. The intervenor had joined the trustee in asking for the sale without the equity of redemption, but at the hearing on January 7th and 8th, Mr. Johnson, one of the counsel for the intervenor, after Mr. Story had withdrawn the trustee's request for the sale without the equity of redemption, joined Mr. Story in withdrawing the request for such a sale. He suggested that the property be preserved as a unit and that the real and personal property be not segregated, but sold and redeemed as a unit.

Thereupon Mr. Story asked:

> "Could it not be agreed that it be sold as a unit?"
>
> The Court: "The Personal property is of such a small amount, I think no serious difficulty would be experienced in arranging for a sale so that it can be kept together. Probably all parties would agree that would be better. I think this has been agreed all along, that it would be better, yet not an insurmountable difficulty to sell with redemption."
>
> Mr. Johnson: "I think if the Court could in its order provide that the unsecured creditors and the

one following after that, the preferred stockholders, could have the right of redemption, I think that would adequately protect their rights. * * * * * If sold for an adequate figure, they are protected; if sold for less than its value, then, of course, there is the right of redemption, which would adequately protect them.'' (Record, pp. 233-4.)

During this hearing it was suggested that the property should be leased for the year 1924, and that the sale should be subject to the lease, thereupon

The Court stated ''you may prepare a form of decree, Mr. Story, the regular form of foreclosure decree, leaving blank such matters as I have not passed upon. The decree will reserve authority to fix an up set price.''

''I assume what has been said here this morning that this is agreeable to all that this decree shall provide that the property be sold as a unit regardless of the fact that some of the property is purely personal, that if redeemed it shall be redeemed as a unit. This statement was agreed to by counsel for all parties * * * * Of course I do not want the decree enlarged beyond necessity. So far as the mode of sale is concerned, that is fixed by Statute anyway, and the decree may simply follow the Statute, but there are other things that may occur to you. * * * * (Thereupon there was some discussion with reference to the right of unsecured creditors to redeem the property. The Court then continued:) ''I am not quite sure whether we can do that, I am trying to let the Statute cover the whole subject of redemption. You have a year under the Statute. If you redeem at all it would be within a year. How could I limit it to six or seven months? * * * I think perhaps the decree had better fix the status of any general creditor whose right is declared by the order as that of the lienholder. I do not recall the exact language of the

> State Statute. Perhaps you had better have that before you when you draw the decree, Mr. Story, and try to fix the status the same as any other redemptioner." (Record p. 251-2-3.)

From this discussion it is clear that the Court intended to order the property sold with the statutory right of redemption, and the hearing concluded with this understanding, at least upon the part of appellant.

We respectfully insist that the Beet Growers Sugar Company was justified in reaching this conclusion, particularly when the court said, "I am trying to let the Statute cover the whole subject of redemption. You have a year under the Statute. If you redeem at all it would be within a year." The positive instruction was given to Mr. Story to have before him the State Statute when he drew the decree, and to fix the status of those entitled to redeem, but nothwithstanding these statements, together with the abandonment of the request on the part of the trustee and the intervenor to sell the property without redemption, when the decree was finally drawn, appellant's right of redemption was not recognized and the statutory period was not allowed. It was then that the order of sale by the receiver was prepared.

Thereupon the appellant immediately prepared objections to the proposed Order of Sale by the receiver and specifically objected to the diminution of the time of redemption from that provided by the laws of Idaho, and we respectfully direct the court's attention to paragraph 2 of the objections filed. Record, pp. 133-4. The objections to the Order of Sale were followed by a petition and other objections, at which it was pointed out that

there was no necessity of selling the property at that time, for the reason that it had been rented for the 1924 season for $115,000, showing conclusively that the property was of good value, and that negotiations were then pending for refinancing the property, and the court was asked to extend the time of sale to and including the 1st day of July, 1924, and that the court fix the proper period of redemption thereafter in the event of a sale being ordered. Record, pp. 135-143.

After the sale had taken place the receiver filed his report of the sale and asked its confirmation. Thereupon objection was made to the confirmation of the sale, particularly upon the grounds:

That the appellants had been denied the statutory right of redemption, and that the Utah-Idaho Sugar Company, by reason of the Federal Trade decision, was not a competent bidder. (Record, pp. 145-207.)

CONCERNING APPELLEE'S ARGUMENT.

Several misstatements are made at page 11 of appellee's brief. Let us consider them:

It is first stated that "no final judgment has been entered in this case, and that no decree of foreclosure can be had," and the inference is that, therefore, no appeal will lie, yet the very first case cited by appellee, that of First National Bank vs. Bunting & Co., 7 Idaho 387; 63 Pac. 694, holds squarely that the order of the court confirming a receiver's sale is a final order, and that an appeal will lie.

In that case, counsel for respondent moved to dismiss the appeal on the ground that no appeal lies from an order or judgment of a court confirming a sale made by a receiver; that what is dominated as a judgment is, in legal effect, only an order, and that appeals from orders are not in harmony with the policy of the law of receivership, and that if the lower court exceeded its jurisdiction, the remedy is by Writ of Review. The court, however, says: The judgment and order appealed from made a final disposition of more than $6,000 worth of assets of the insolvent bank of Bunting & Company, and, we think, comes clearly within the provisions of Section 9 of Article 5 of the Constitution of this state, which provides that "the Supreme Court shall have jurisdiction to review upon appeal any decision of the District Court or the judges thereof.

The decision complained of, we think, is such an effectual and final disposition of a large amount of the assets of said insolvent estate as to come clearly within the provisions of said section of the Constitution, and that an appeal is the proper proceeding whereby to review the judgment of confirmation. Sub-division 1, of Section 4807, Revised Statutes, among other things, provides that an appeal may be taken to the Supreme Court from a final judgment in a special proceeding. The statutes in regard to the appointment of receivers and the case of insolvent estates is placed under the chapter concerning provisional remedies, and an order or judgment made in regard to insolvent estates which concludes the rights of the parties is appealable."

To say, therefore, that no final judgment is entered is clearly erroneous, and to state that a foreclosure of the mortgage could not be decreed is to state that the statute providing for a foreclosure is meaningless.

On page 11 counsel again repeats the statement that the receiver was appointed with the consent of appellant.

This we have heretofore shown to be untrue. He claims that the action was converted into a general receivership for the purpose of winding up appellant's affairs, and that no defense was made to these important matters. The enlarging of the receiver's powers was directly in the interest of the company. The first order of appointment made the receiver practically a custodian to care for the property of the company. By this appointment, the company was left without the right or power to operate the factory or to lease it pending the receivership and to maintain during this time the company as a going concern. It was for the purpose of protecting the property, continuing its operations, enabling the officials to effect a refinancing of the company, and to bring about a termination of the receivership, that no objection was made to the order increasing the receiver's powers. By consenting to the enlargement of the receiver's powers, it meant that for the year 1923 more than sixty thousand dollars was received as lease money, and the property was leased for the year 1924 for one hundred fifteen thousand dollars. To suggest, therefore, that because the receiver's powers were enlarged, that the company lost its right of redemption, is absurd. To urge that because objection was not made to an order enlarging the powers of the receiver deprived the company of the right to object when the company's rights under the statutes of Idaho were denied, is a process of reasoning we cannot agree to, and the case of Gila Bend Reservoir and I. Co. vs. Gila Water Co., 205 U. S. 279, cited, does not in any sense uphold any such contention. In that case it was urged that the order of sale was made in a

suit in which the receiver had not been appointed, but the record disclosed that there were two cases pending, and the court tried them as having been consolidated, and when, after sale and confirmation, the jurisdiction of the court was for the first time questioned. The court stated:

> "It is now contended that inasmuch as the question is one of jurisdiction, neither the omission to call attention to the matter in the prior litigation operates to render the decree in the case as *ris judicata* upon the question, but leaves the matter open for personal inquiry.

Counsel are mistaken in that direction. The present appellant was the defendant. The property was in the possession of the court, even if held under a receivership. The decree directed a sale. It was sold. The sale was confirmed, the deed made, and the property delivered to the purchaser. The appellant at least cannot now question the jurisdiction of the court in that suit or the title which is conveyed to the purchaser at the sale. A failure to make a defense by a party who is in court is, generally speaking, equivalent to making defense and having it overruled, * * * * and the cases not having been consolidated, it was, by counsel, contended the court had no power to order the sale," but the court answered:

> "This is tantamount to saying that the absence of formal orders by the court must prevail over its essential action.

It is clear from the record that the District Court considered the cases pending, but it at the same time considered No. 1996 as a complement of No. 1728; regarded the cases as in fact consolidated; and empowered the receiver appointed in No. 1728 to sell the property and distribute the proceeds, as directed by the decree in No. 1996."

It will thus be observed that the question in that case merely related to whether two cases had been consolidated by the court, and that the orders and decrees rendered in each case should be considered together. The court held that such was the action of the court. It had nothing to do with the question as to whether, because a receiver in a case had been appointed, the court was empowered, when a sale of the property was ordered, to deny the owner the statutory right of redemption.

Again, it is stated (Brief, p. 12), that:

> "There cannot be the slightest doubt that the sale was made as a receiver's sale."

It is true that the order directing the sale was entitled an "Order for Sale by Receiver," but whatever the designation may have been, it was in effect a foreclosure sale. The original action was based upon the default of the company in paying the interest on its bonded indebtedness. The bonds were secured by a trust deed. The trustee proceeded in accordance with the terms and provisions of this deed. It is true that subsequently the trustee and the intervenor sought to secure a sale of the property without the right of redemption to which the company was entitled. As above shown, both the trustee and the intervenor withdrew this request and consented to the sale with the right of redemption, and the court from the bench clearly indicated that a sale of that character was to be had, and directions were given to draw the decree of foreclosure in conformity with the statute. The fact, therefore, that the court entitled it an "order of sale by the receiver," and provided how the money

should be finally distributed, did not deprive the company of its rights under the trust deed. The bondholders were first protected after the payment of the necessary expenses incurred by the receivership, so whether or not the order providing for the sale of the property was headed a "foreclosure sale" or "receiver's sale" is not the vital question involved on this appeal. The question is whether the company can be deprived of its right of redemption under the Idaho statute, particularly in view of the fact that none of the parties before the court were asking for a sale without the right of redemption.

It is stated (Brief, p. 15), that:

> "Undoubtedly a receiver's sale may be made without redemption," and certain cases are cited.

Most of these cases are referred to in appellant's original brief, and it is there shown that they do not support the action of the court in the case at bar. Appellee first directs the court's attention to the case of Hewitt vs. Walters, 21 Ida. 1, 119 Pac. 705, and only the following excerpt is quoted from the opinion in that case:

> "The court had the power and jurisdiction to order that the sale be made without the right of redemption, and such order is binding on all parties to the proceedings."

This is but a general statement of the law, but in that case the decision of the lower court was affirmed upon the ground that the plaintiff had "*consented to and acquiesced in the order and decree, and is now bound thereby.*"

During the course of the opinion the court cites various authorities which discuss the right and power to order receiver's sales without the right of redemption, but immediately follows the citations with the following language, at page 708:

> *"It is unnecessary, however, for us to determine that question in this case, and we reserve our judgment thereon for the reasons that the facts of this case remove it from the contingency above suggested."*

We insist that an examination of this case will show that it does not sustain or become authority for the trial court in the case at bar, to deny appellant its right of redemption.

The case of Parker vs. Decres, 130 U. S. 43, is next cited. This case does not sustain counsel's contention, but is authority in support of appellant, and was cited in its original brief. In that case Mr. Justice Harlin states:

> "In many states the right to redeem within a prescribed time after a sale under a decree of foreclosure is given in certain cases by statute. The right when thus given is a substantial one, to be recognized even in courts of the United States sitting in equity, because the statute constitutes a rule of property in the state that enacts it."

That the Idaho statute gives one year for redemption is not denied. To attempt, therefore, to argue that because there is not a specific provision authorizing a year's time to redeem from a receiver's sale, does not warrant the court in ignoring the statute that gives the year's right of redemption in foreclosure sales. If the

court possessed the power to deny the statutory right of this character, why enact the law? Is it to be suggested that when the Supreme Court states, as was done in the Decres case, that:

> "The right when thus given is a substantial one, to be recognized even in the courts of the United States sitting in equity,"

that this statement and decision is meaningless and the trial courts are not to be governed by decisions of this character?

It is next stated (Brief, p. 16) that the statute of Idaho does not give the right to redeem personal property from a sale on execution or on foreclosure, and that therefore the court was warranted in allowing the right of redemption. It must be remembered that the personal property was stated by the court to be of small value. The personal property was covered by the trust deed. It was conceded by all parties that the factory and plant was operated as a single unit, and it was stipulated that it was to be so sold. Is it to be contended that in view of these facts that because there was personal property of the value of a few thousand dollars, conceded to be a part of the working plant of the company, that appellant should lose its right of redemption for property covered by the trust deed that aggregated more than a million dollars?

The case of Carson vs. Allegheny Window Glass Co., 189 Fed. 791, is cited. This case, however, does not involve the question of a sale of property without redemption. The principal question there discussed is: will the

court appoint a receiver of a solvent corporation at the request of a minority stockholder? The court discusses generally this question, and says:

> "Special and exigent circumstances may, in the absence of a statute, warrant and justify a receivership of a corporation, although solvent, for the purpose of winding up its affairs and distributing its assets, or of temporarily taking charge of and protecting its property and managing its business and affairs. If it has become impossible for the corporation to answer any of the ends of its creation, and it has thus utterly failed of its purpose, a court of equity would, under its general jurisdiction and powers, and wholly aside from any statutory provision in that behalf, be authorized to wind up its business and affairs for the benefit of those interested, namely: its creditors and stockholders, although not involving a dissolution or termination of the corporate franchise."

From the foregoing, it will be seen that the question as to whether the court has the power to deny the statutory right of redemption is in no sense involved, and does not afford the court any aid in determining the questions now before it.

To attempt to justify the action of the trial court, counsel for the appellee suggests (Brief, p. 17) that in this case the appellant does not even answer the description of a judgment debtor, nor are there any creditors having a lien by judgment or mortgage on the property sold subsequent to that on which the property was sold, and that the property was not sold to satisfy any lien or encumbrance against it. We earnestly insist that this statement is untrue. The court, by its various orders, fixed and determined the amount due the bond-

holders and the other creditors. By its orders it determined the priorities of these claims, and the order in which they were to be paid from the proceeds of the mortgaged property which was being sold in the action brought for the purpose of foreclosing the lien created by the trust deed. These orders constituted in effect a judgment. It was a judgment against the Beet Growers. Sugar Company, and, as heretofore shown in the Bunting case, the order confirming the sale of the property was a final judgment, from which an appeal would lie.

Attention is called to the case of Pac. N. W. Packing Co. vs. Allen, 116 Fed. 312, suggesting that this case holds that there is no right of redemption from the sale of personal property. This decision, as pointed out in our original brief, is based upon the fact that the corporation involved was of a public or quasi-public character, and that the entire interest of the appellant was mortgaged, including all of the interest of the mortgagor in certain piling, roadways and approaches to a wharf which connect the structures with the upland, and that the case fell within the reasons assigned in the Railway cases for not following the statutory provisions for redemption. In other words, this case recognized the public or quasi-public nature of a property mortgaged, and held that the case fell within the rule announced in the Railway cases. It did not attempt in any manner to overrule the case of Bryne vs. Insurance Co., 96 U. S. 627.

The case of State vs. Stephens (206 Pac. 1094) is cited apparently upon the proposition that the statutory right to redemption is not property, but a bare personal priv-

ilege. Whether the statutory right to redemption is property or a personal privilege is wholly immaterial. This question is not involved. The case cited merely construes the Montana statute. It held that the judgment debtor did not redeem within the time allowed by law and that the right of redemption was a personal privilege to him and not a property right upon which an execution or an attachment could be levied. In other words, he not having exercised his right to redeem under the law, his creditor could not attach this privilege. We submit that it needs no discussion to show that this case has no bearing upon the matters under discussion.

The case of Morrison vs. Burnette (154 Fed. 617) does not involve the question of the right of redemption, but relates merely to the proposition that in a proper receiver's sale the purchaser bids with full knowledge that the sale to him is subject to confirmation by the Court, and that the Court has the right to exercise certain judicial powers in respect to confirming the sale. This case does not consider the question of the right or power of the court to disregard the statutory right of redemption and order a receiver's sale, thereby depriving the mortgagor of his statutory right of redemption.

The case of Watkins vs. Minnesota Thresher Mfg. Co. (41 Minn. 150) is cited upon the proposition that the right of redemption is not incident to a sale by a receiver of an insolvent corporation. This case, however, recognizes the very rule for which appellant contends; that is, that the right of redemption exists by force of statute, and does not exist where there is simply a general statute authorizing a receiver to take property and

hold it in *custodia legis* for the purpose of paying the debts of an insolvent corporation.

The court held that under the particular circumstances the party there seeking to redeem did not fall within the class provided for by the statute; in other words, the case recognizes the right to redeem, but only in accordance with the provisions of the statute. This case does not hold that the court has the right to refuse to grant the right of redemption provided for in the statute and to substitute therefor a receiver's sale denying this right.

The case of Owen vs. Kilpatrick (11 So. 476) is cited without comment. This case merely holds that only those authorized by statute may redeem; that it is a statutory right, and those seeking to exercise it must fall within this right.

We insist that this is the law and that when one does fall within the proper class, the court has no right to deny the benefits of a statutory provision.

The court's attention is directed to the case of Corless vs. Clinton (Michigan), (180 N. W. 478), and the companion case of Bank of Commerce vs. Corless (186 N. W. 717).

In the former an application was made for the appointment of a receiver for the Waterloo Creamery Company. The action was based upon certain promissory notes unsecured. The defendants moved to dismiss. This motion was denied. Later objections to the appointment of the receiver were made and affidavits filed in support thereof, and testimony having been taken

from which it appeared that the company was indebted in large sums, was unable to pay for the milk being furnished by the farmers, that if the plants were closed down and allowed to remain idle for any considerable length of time the herds from which milk was secured would be dissipated and the milk derived therefrom would seek other outlets, that if at a later day the plants were reopened that it would be difficult, if not impossible, to secure a supply of milk, and that the plants were worth as a going concern at least double the amount they would be worth if closed down indefinitely. The court held upon the showing made that in the exercise of its equity powers it had the right to appoint a receiver. On appeal it was contended that the court was without authority to appoint a receiver prior to a full hearing and final decree. This contention was overruled, the court holding that it was within its discretion as to whether a receiver should be appointed. The question of the right of redemption was not considered in the first case.

In the latter case it was contended, first, that the court had no power to appoint a receiver of the real estate and the income thereof, and, second, that the sale, if one is to be had, should be a foreclosure sale. The Supreme Court held that the decision of the court first rendered, refusing to dismiss the application for the appointment of a receiver, was correct. Upon the second proposition the court states that "the argument was made that if a sale is to be made it should not be a short sale without redemption, but a foreclosure should be had analogous to that of a mortgage. The evidence shows that the property in suit as a going concern is worth

upwards of $100,000.00. The property is an admixture of real property, personal property and intangible values arising out of the milk routes and patronage of the farmers. It appears in evidence that if the milk routes were eliminated, as they would be if any considerable interruption took place, the farmers would find other outlets for their milk, and with the loss of this patronage the entire property would depreciate in value 50%.

It was further found that the defendants were insolvent. It will be noted from the foregoing that the property was not under mortgage, no suit had been commenced seeking to foreclose any mortgage or trust deed given as security for the notes of the company. The case was simply that of a general receivership. The question of the statutory right of redemption was not involved. The court held that "in view of the character of the property involved makes it an exception to the general rule that real estate must be followed by a period of redemption. * * * * The court then quotes Cyc. as follows: "It has been held that a law providing a right of redemption from sales of real estate does not cover the case of a sale of the entire property of a quasi-public corporation, such as a railroad or a water company, including its real and personal property and franchise, but such sale may be made as an entirety without redemption." It then cites the case of Hammock vs. Farmer (105 U. S. 77), and Pacific N. W. Packing Co. vs. Allen (116 Fed. 312). In other words, the court invokes the modified rule of the United States Court that where a quasi-public corporation is involved or where franchises relating to canals, telegraph, telephone, electric light,

gas, water plants and railroad are involved, that the property may be sold without the right of redemption. All of these decisions, however, are based upon the public character of the property involved, and particularly as the same relate to franchise. No statute in the State of Michigan is quoted, no mortgage was involved, and the principal property owned by the insolvent company was intangible in character and arose out of milk routes and the patronage of farmers.

This is the nearest case in point which counsel have been able to direct the court's attention to, and we submit that this case does not overcome or supplant the rule adopted by the Supreme Court of the United States in the case of Brine vs. Insurance Company, heretofore referred to, nor does this case meet the law as announced by the Supreme Court of Illinois in the case of Locey Coal Mines vs. Chicago W. & V. Coal Co. (22 N. E. 503).

It is urged that the case of Blair vs. Ill. Steel Co. (59 Ill. 350) modifies the decision in the Locey Coal case. The decision in the Blair case, however, recognizes that the Locey decision was based on the Illinois statute, which expressly gives the right of redemption to all sales of real estate by virtue of an execution, judgment, or decree of foreclosure of a mortgage. It specifically states that the sale was ordered in a decree rendered upon a creditors bill to enforce the collection of a judgment at law for the payment of money, but in the Blair case there was no decree of foreclosure or sale under a trust deed. The Blair case does not even modify the decision in the Locey case, but specifically recognizes the rule there announced, and it will be found upon examination

that the statute of Illinois which was involved was almost identical with the Idaho statute, so that the Blair case in no manner modifies the rule for which we contend.

The case of Continental Bank vs. Corey Bros. (208 Fed. 976) involves principally the question as to whether liens took priority over certain trust deeds. In that case an action was brought to foreclose a mechanic's lien on an irrigation system, and the court decreed a sale of the entire system without the right of redemption, but because it appeared that the property subject to the lien was so blended and reciprocal in its use that to divide it and sell each part separately would destroy or greatly impair its value, to the serious detriment both of the public and private interests. The property involved related to irrigation works constructed under the Carey Act. It involved an entire irrigation system, with rights of way, various franchises, and other property, and the court held that the rule invoked in the case of Pacific N. W. Packing Co. vs. Allen should apply. The decision is based entirely on the character of the property.

To the same effect in the case of Title Insurance and Trust Co. vs. California Dev. Co. (152 Pac. 542). This was another irrigation project and involved the public and the right to use water in the State of California and in the Republic of Mexico. This decision is also based upon the particular character and nature of the property; it involved franchises and various intangible assets which would be without value segregated from the main enterprise.

We therefore respectfully insist that an examination of the authorities quoted and relied upon by the appellee do not warrant the court in denying to appellant its statutory right of redemption.

Counsel is again in error in suggesting that the court in the drawing of its order and providing for a $15,000.00 penalty saved the company in the event it redeemed the property $51,000.00. Under counsel's own contention six months time was allowed for redemption; 10% interest for that period would amount to $40,000.00, to which was added a penalty of $15,000.00, or a total in all of $55,-000.00, instead of $29,000.00, as computed by counsel for the appellee.

CONCERNING FEDERAL TRADE DECISION.

No attempt has been made by the appellee to answer the suggestions contained in appellant's brief insofar as it relates to the Utah-Idaho Company being a competent bidder. The discussion of counsel upon this subject in effect confesses the validity of the Federal Trade Act and the rightfulness of the decision quoted in construing this Act. If the Act means anything, can it be said that the Utah-Idaho Sugar Company, having been found guilty of a conspiracy to wreck the Beet Growers Sugar Company, should then have the right to take advantage of its own wrong and become a purchaser at a forced sale of the Beet Growers property, which was in effect brought about through its unlawful acts?

We assert again that the Utah-Idaho Company only attempted to appeal from the decision of the Federal Trade Commission after objections were made to its competency as a bidder for the Beet Growers property. No authorities are cited showing that time for appeal has been extended or that the usual six months rule does not prevail. The question and suggestion that the purchasing of the property was only an intra-state matter and has nothing to do with interstate commerce, and that the Federal Trade Commission was entirely without jurisdiction in the matter, is nothing but a rehash of the contention made by the Utah-Idaho Company in its proceedings before the Federal Trade Commission, but which were wholly disregarded.

We insist that this Honorable Court should give full force and effect to the decision of the Federal Trade Commission, and by so doing protect the Beet Growers Sugar Company from the wrongful acts perpetrated against it from its very organization by the Utah-Idaho Sugar Company.

We respectfully ask for a reversal of this cause.

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Attorneys for Plaintiff in Error.

No. 4249

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BEET GROWERS SUGAR COMPANY, (*a corporation*),
Defendant,

Plaintiff in Error,

vs.

COLUMBIA TRUST COMPANY, (*a corporation*),
Trustee, Plaintiff,
and
E. D. HASHIMOTO, *Intervenor*
and
A. V. SCOTT, *Receiver,*

Defendants in Error.

Brief of Appellee

A. V. SCOTT, *Receiver*

OTTO E. MCCUTCHEON,
O. E. MCCUTCHEON,
Attorneys for A. V. Scott, Receiver.

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OTTO E. MCCUTCHEON,
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I

STATEMENT OF FACTS

It is necessary to amplify the statement of facts made by the appellant so as to give the court a clearer view of the situation.

The mortgage described in plaintiff's complaint contained a covenant that upon filing a bill in equity or the commencement of any judicial proceedings to enforce any right of the trustee or of the bond holders under the mortgage, that the trustee should be entitled to the appointment of a receiver with such power as the court should confer. The complaint prayed for the appointment of a receiver. In its answer the defendant consented to the appointment of the receiver.

Printed Transcript Page 18, *Sec.* 5 *and Pages* 30-31.

Thereupon A. V. Scott was appointed as such receiver. E. D. Hashimoto, a holder of shares of the preferred stock of the defendant Beet Growers Sugar Company, was permitted to intervene, and in his complaint in intervention it was alleged, substantially, that the intervenor represented an association of preferred stockholders of the defendant Beet Growers Sugar Company which had been organized for the purpose of acting in concert to protect the interests of all of the preferred stockholders; that under the articles of incorporation the said company had provided for two hundred thousand shares of preferred stock of the par value of $10.00 per share, and that about one hundred twenty thousand shares of said preferred stock had been sold, and the holders thereof had invested in said enterprise cash to the amount of $1,200,000.00; that the value of the assets of the company did not exceed the sum of $1,200,000.00, and that

the debts of the said company, secured and unsecured, amounted to approximately $600,000.00; that there was no equity or value in said property after the payment of debts, for division among the common stockholders—any equity remaining after the debts were paid being less than sufficient to pay and satisfy the preference of the preferred stockholders; that the preferred stockholders were entitled to seven per cent cumulative dividends before there could be any distribution of dividends to the common stockholders, and, likewise, the preferred stockholders had the preference to distribution of moneys arising out of any sale of the capital assets of the defendant to satisfy accumulated dividends and the principal investment up to the par value of the shares, before any distribution of assets could be made to the common stockholders.

It was further alleged that since the appointment of the receiver the board of directors of the corporation had ceased to function; that disputes had arisen between groups of stockholders, and that no one was vested with power or authority to determine the rights and priority of the preferred stockholders, or to reconcile or determine the rights of the conflicting groups of stockholders; that the good will of the business and sugar factory was of great value, and that the same "will be dissipated and wholly lost unless contracts are made for the season of 1923 with beet growers in the adjacent territory;" that many of the common creditors of the corporation held part of the bonds secured by the mortgage sought to be foreclosed in the action as security for their claims, and that in many instances the amount of bonds held as security was twice or three times the amount of the entire indebtedness due from the corporation to its creditors, and that said creditors were proceeding to sell the bonds pledged so as to acquire title thereto; further alleged: "As to the remainder of said bonds a portion thereof have wrongfully been taken by officers of the company who hold the same to protect and secure their al-

leged personal claims against the defendant, Beet Growers Sugar Company, which alleged claims represent but a small proportion of the face value of the said bonds so taken, and in taking the same the said officers wrongfully and improperly, and to the prejudice of the creditors of said company, pledged to themselves as creditors, and have assumed to act in the taking as officers, when in fact incompetent so to act because of their personal interest."

It was further alleged that "the bond holders, the trustee and all parties were anxious to have contracts made with the beet growers in adjacent territory so that the good will of the corporation might be preserved, and were willing and desirous in the event that the court should so order to have the expense thus incurred made a part of the expense of the administration of the estate underlying the mortgage debt." Part of the prayer of the complaint in intervention read as follows:

"2. That in the meantime and pending final decree herein, the receivership herein be extended, and the said receiver clothed with the powers of a general and operating receiver; and that all creditors be required to present their claims, the same to be adjudged and determined in this action—to the end that the rights of all and every person interested in the property of said corporation be now and herein determined."

On February 26th, 1923, no motion, demurrer, plea or answer had been filed to the complaint in intervention, and no appearance made in opposition thereto, on motion of the solicitors for the intervenor, it was ordered and decreed that the complaint in intervention be taken *pro confesso* as to the defendant and appellant Beet Growers Sugar Company, A. V. Scott, receiver of the defendant, and the Columbia Trust Company, plaintiff.

The complaint in intervention aforesaid was filed with the consent of all parties, and the purpose and effect there-

of was to wind up the affairs of the corporation by sale of its property, and for an equitable distribution of its assets, first, to its creditors secured and unsecured, and second, to its preferred stockholders. This purpose was later admitted by the appellant in its answer to the petition of the intervenor to sell the property of the defendant company. See paragraph 3 page 63 printed transcript, from which we quote as follows: "This defendant admits that the complaint in intervention of the said intervenor was filed with the intention and for the purpose of winding up the affairs of this defendant by a sale of its property."

The petition of the intervenor to extend the powers of the receiver so as to carry out the purpose of the complaint in intervention was presented to the court and a hearing thereon ordered for December 30th, 1922. Notice thereof was given and served upon all the parties to the action, and at the time set for the hearing of said application no objection having been made to the granting of the order, the powers of the receiver were enlarged, and he qualified.

April 17th, 1923, an order was made by the court after a hearing at which the defendant Beet Growers Sugar Company was represented, appointing an examiner of the court to take testimony as might be offered by the respective parties to the cause or holders, whether as pledgees or owners, of the bonds of the defendant Beet Growers Sugar Company as were then issued and outstanding, in relation to the ownership of such bonds or the validity of pledges under which the same were held; and also in relation to the amount and validity of the claims against the defendant which were secured by a pledge of such bonds. This order was approved by the attorneys for the defendant and appellant Beet Growers Sugar Company.

Under the order enlarging the powers of the receiver he was directed to call for claims of creditors against said Beet Growers Sugar Company, and publish and mail no-

tices to creditors to present their claims within sixty days after the first publication of the notice under penalty of having the same disallowed in the discretion of the court.

Afterwards the receiver was ordered and directed to advertise for bids for leasing of the property for the sugar making campaign of the year 1923. Contracts were made with farmers to grow beets to supply the raw material, the necessary funds were advanced by the Association of Preferred Stockholders, and in September, 1923, a lease was made by the receiver to the Association of Preferred Stockholders, and the factory was operated during the fall of 1923; a similar lease was made for the campaign of 1924.

The property covered by the mortgage to the plaintiff was both real and personal: "All comprising parts of a single working plant or utility, to wit: A sugar factory, in which each part is necessary to give value to the others, including the good will and both the real and personal property, and where a dismemberment of the system would destroy or greatly impair the usefulness or value of its component parts."

December 28th, 1923, the court made and entered a memorandum decision appearing at page 86 of the printed record, in which the status and affairs of the Beet Growers Sugar Company was analyzed, and the question of whether the property should be sold without redemption was considered and discussed by the court, and the following conclusion indicated by quotation from the decision was reached: (Page 92 printed record). "It is apparent that the common stockholders and the company, in so far as it represents only the common stockholders, have no real interest in the question of whether the sale be made with or without redemption, for the aggregate of the secured claims, the unsecured claims, the taxes, and the unpaid expenses of the receivership and of the trustee, taken together with the amount of outstanding preferred stock, which must be paid

before anything could go to the common stock, will very greatly exceed the amount which there is any reason to expect could be gotten for the property at a sale, either with or without redemption. In view of the heavy indebtedness of the receivership if we take into consideration the large item of taxes which the receiver has now been directed to pay by the issuance of receiver's certificates, constituting a first lien upon the property, I am inclined to the view that I should before resorting to foreclosure sale, attempt a receiver's sale, the same to be without redemption. The considerations brought forward for an expeditious disposition of the property, finally and absolutely, are very cogent. Some preparations must be made within the near future for the season of 1924, or the plant will be idle for a year with a very great incidental loss."

In short, the court concluded that a receiver's sale without redemption should be authorized at an upset price, and a hearing was ordered to be held on the 7th of January, 1924.

An order was made authorizing the receiver and the auditor of the company to determine the total amount of unsecured claims and report to the court.

On January 19th, 1924, the court made a memorandum order of sale of the property by the receiver, in which it was suggested that the original conclusion reached by the court should be adhered to, and that a sale should be made by the receiver. Suggestions were invited from all parties of record, and a draft of a proposed order of sale by the receiver was served on each party of record, and thereupon under date of January 25th, 1924, the court made its order for a sale by the receiver fixing an upset price of $650,000.00, and containing this recital:

"8. And it fruther appearing that it will be necessary to sell all of the property of the defendant Beet Growers Sugar Company to pay said indebtedness, and that said prop-

erty constitutes a single operating unit, and should be sold together in one parcel, and that in view of the status and exigencies of the case a better price can in all probability be gotten by the Receiver than by a Master upon foreclosure sale, and that by a Receiver's sale the rights of all parties interested may be more fully protected."

The order fixed the terms of the sale and made the following provision in respect to redemption: "Redemption: It being considered that if possible the sale should be made subject to the right of redemption by parties interested, such right to be exercised within a reasonable time and upon reasonable terms, with reasonable inducements to the purchaser to make the purchase subject to such right; and it being thought that the upset price so fixed will be sufficient to cover all indebtedness of the company, and that therefore in addition to the company the only interested parties are the preferred stockholders, who have rights and interests that the company may not be willing or able to protect; and it also having been shown that it is highly important that the sugar company be kept a going concern and that it operate each year, and that to that end it is necessary to contract with farmers for the raising of sugar beets, beginning about February first of each year for the season's run of the current year, and that therefore a period of redemption longer than six months would extend into the 1925 season and hence jeopardize operations for that year;

"It is further ordered that the said sale be made subject to the right of redemption, such right to be exercised within six months following the date of the aproval of the sale. A redemptioner was required by the terms of the order to pay the purchaser "not only the purchase price in full which the purchaser has paid for the property, but interest thereon at the rate of ten per cent from the date of approval of the sale, and, in addition thereto, the sum of $15,000.00."

It was stated that the right of redemption in the order provided for was intended primarily for the protection of the preferred stockholders and all of them, and for their benefit, and was granted upon the condition and the with the reservation that it should not be assigned, transferred or encumbered without the consent of the court first obtained.

March 1st, 1924, the property was sold for $800,000.00, which was $150,000.00 more than the upset price fixed by the court.

In the meantime during the time the advertisement of sale was running, a supplemental order of sale was made by the court calling attention to the fact that the factory had then been leased by the receiver, and contemplating bidders were notified of the fact, and providing that in case of redemption the redemptioner and not the purchaser at the sale, should be entitled to the rentals which were to be paid by the lessee subsequent to the date of sale.

The sale was had, confirmed, and the time for redemption having expired and there having been no redemption, conveyances of the property have been executed and delivered by the receiver.

When the present appeal was taken no supersedeas was granted, and in the month of May, 1924, the appellant made application to this court for a supersedeas bond and after hearing, on consideration the same was denied.

II

ARGUMENT

FIRST PROPOSITION.

THE SALE WAS MADE AS A RECEIVERSHIP SALE, AS THE ORDER CLEARLY DISCLOSES, AND WAS NOT A FORECLOSURE SALE. SEE ALSO STATEMENT OF PROCEEDINGS IN TRANSCRIPT.

No final judgment has been entered in this case. No foreclosure of the mortgage has been decreed and none can be had. The plaintiff presented his claim to the receiver; it was allowed and paid out of funds derived from the receiver's sale of the property. No execution has issued, and none can be issued for all of the debts of the appellant have been paid.

A receiver was appointed with the consent of appellant; the action was converted into a general receivership for the purpose of protecting and determining the rights of all interested parties and winding up appellant's affairs; the appellant consented to this procedure and a decree *pro confesso* was entered against it.

Appellant made no defense to these important matters; it made no objection to the enlargement of the powers of the receiver, and the necessary order was subsequently made, entered and, ultimately, the necessary details were carried out to accomplish the result which the general receivership sought to attain, so that this appeal really constitutes an objection to a matter of detail. There is no question here of the power of the court to order the sale to be made. The court acquired jurisdiction to sell when it took the property into its possession. First Nat. Bank vs. Bunting & Co., 7 Ida. 387, 63 Pac. 694. The property was

in the possession of the court with the consent of all parties, the order directed its sale by the receiver, it was sold, the sale was confirmed, the receiver made a deed and the property was delivered to the purchasr. The time for the defendant to have objected to a general receivership for the express purpose of accomplishing what has been done, passed with the entry of the order that judgment against the defendant be taken *pro confesso* on the bill of the intervenor. Appellant might have objected to the granting of the order for the enlargement of the powers of the receiver, but appellant will not now be heard to object to a detail of administration. As was said by Mr. Justice Brewer in the case of Gila Bend Reservoir and I. Co. vs. Gila Water Company, 205 U. S. 279: "A failure to make a defense by a party who is in court is, generally speaking, equivalent to making a defense and having it overruled."

There cannot be the slightest doubt that the sale was made as a receiver's sale. The order directing the sale is entitled: "Order for Sale by Receiver," and it recites reasons which induced the court to conduct the sale of the property by the method adopted. It contains this language: "It is therefore ordered that the receiver be and he is hereby authorized and directed, with all reasonable dispatch, to make a sale of said property, subject to the approval of the court." It was further provided that the sale should be made at such time as the receiver might designate between certain hours of the day; it fixed the manner in which the receiver should give notice of the sale, by publication in designated newspapers; it provided that the notices should contain the further statement that the sale would be made upon the terms and subject to the conditions and directions of the court, and that copies of those orders would be furnished by the receiver to any interested person applying to him; it further vested the receiver with power to adjourn the sale from time to time to a date certain; it provided that an inspection of the property might be made by intending bid-

ders prior to the sale, subject to such reasonable requirements as the receiver might prescribe; it provided that immediately upon the announcement by the receiver of the acceptance of a bid subject to the court's approval, the bidder should pay to the receiver $10,000.00 to be credited upon the purchase price if the court should approve the sale, and pay the residue of the purchase price as in the order specified. It further provided that a certain amount of the purchase price might be paid by delivery to the receiver of receiver's certificates representing outstanding indebtedness of the receiver owned by or assigned to the purchaser at their full face value, or, by certain outstanding bonds of the appellant company, or, by claims against the company secured by bonds as collateral, together with the collateral bonds. It further provided that when a sufficient amount had thus been received to cover all the indebtedness of the company, the compensation and expense of the trustee and its attorney and the unsecured indebtedness represented by the outstanding bonds and claims with collateral bonds, and the judgments against the appellant referred to in the order, the residue of the purchase price might be paid by the purchaser either in money or by the turning over to the receiver of unsecured claims at a value equivalent to the distributive share such claims would be entitled to receive were the purchase price paid in cash. Upon approval of the sale by the court and upon the order of the court, the receiver was directed to execute to the purchaser a certificate of sale with appropriate recitals of the conditions of the order relative to the redemption, and at the expiration of the period of redemption if no redemption had been made, the purchaser should be entitled to appropriate instruments of conveyance to be made either by the receiver or a special master to be appointed for that purpose, all pursuant to the further orders of the court, and it was further provided that: "and if the property be not redeemed by the defendant it will be required to execute and deliver confirmatory con-

veyances." All of the foregoing appears from the order of sale appearing in the printed transcript at page 114 to and including page 126.

The receiver actually made the sale as ordered and filed his report and prayed for an order of confirmation. A hearing was ordered in the matter of confirming the sale, and on the 15th day of March, 1924 an order confirming the sale was made and the receiver's certificate of sale was issued.

Throughout the brief of appellant language is used which, if unexplained, would lead the court to believe that the sale described was a foreclosure sale. We find this language first on page ten in the statement which, in part, reads: "In which to redeem its property from the foreclosure sale." On page 13 in the following language: "And having secured its judgment of foreclosure." Again on page 14 we find this: "And its right of redemption from the foreclosure sale." There may be others, but these suffice to call the attention of the court to what are manifest inaccuracies. No such event as the foreclosure of a mortgage has occurred.

It was thought at a certain stage of the proceedings that a decree of foreclosure might be entered, as appears by the form of a proposed decree and discussions relating thereto, which appear in the record. The idea was abandoned, however, when the court reached the conclusion that all rights and interests might be better protected and conserved by refusing to allow a foreclosure of the mortgage.

III

SECOND PROPOSITION.

UNDOUBTEDLY A RECEIVER'S SALE MAY BE MADE WITHOUT REDEMPTION.

In the case of Hewitt vs. Walters, 21 Ida. 1, 119 Pac. 705, the point was expressly decided in the following language:

> "The court had the power and jurisdiction to order that the sale be made without the right of redemption, and such order is binding on all parties to the proceedings."

As was said by Mr. Justice Harlan in Parker vs. Dacres, 130 U. S. 43:

> "In the view we take of this case it is unnecessary to express an opinion whether the provision relating to sales under execution, properly interpreted, gave a right of redemption after sale under a decree of foreclosure. If it did not, the decree below must be affirmed, *for a right to redeem, after sale, does not exist unless given by statute.* * * * * We are not aware of any such right existing at common law, or in the system of equity as administered in the courts of England previous to the organization of our government."
>
> In the Hewitt case it was said: "It is conceded that the statute of this state, no where in express terms grants the right of redemption from a receiver's sale."

The case was decided in December, 1911, and it must be conceded here that no such statute now exists.

The important feature of the case of Hewitt vs. Walters is that the supreme court upheld a receiver's sale of property without the right of redemption. It was a question of jurisdiction to make such a sale which was answered in the affirmative.

In the case at bar personal property, as well as real estate, was in the hands of the court, "all comprising parts of a single working plant or utility, to wit, a sugar factory, in which each part was necessary to give value to the others and where a dismemberment of the system would greatly impair the usefulness or value of its component parts." No statute of Idaho gave a right to redeem personal property from a sale on execution or on foreclosure.

In this situation the court was confronted with the question of determining whether it was feasible to sell the different kinds of property separately, and thus dismember the plant, and, no doubt sacrifice the good will of the business as a going concern, or, on the other hand, whether it would not be to the best interests of all the parties before it to have the receiver make the sale of the plant as a single unit. Confronted with this proposition, and, in consideration of the fact that the suit had taken the form of a receiver's suit for the dissolution of an insolvent corporation, there was no doubt but that the receiver's sale afterwards ordered, was altogether the better way to proceed.

Cases other than the Idaho case which authorize a receiver to make sales of property without redemption:

Carson vs. Alleghany Window Glass Co. 189 *Fed.* 791.

In a very similar case to that at bar which occurred in the State of Michigan and which involved a creamery, the court appointed a temporary receiver to operate the plant and to preserve the property, and to avert the danger of ruinous loss not alone to the plaintiff, but to all other creditors. The propriety of the action of the court in making the appointment was considered by the Supreme Court of Michigan in Corless vs. Clinton, Circut Judge, 212 Mich. 476, 180 N. W. 478. The appointment was upheld. Finally the state Circuit Court ordered all the property to be sold wihtout redemption, and this order was upheld in the

case of Bank of Commerce vs. Corless, 186 N. W. 717.

Reference is made by the appellant to the case of Locey Coal Mines vs. Chicago Coal Company, 22 N. E. 504, which was decided by the Supreme Court of Illinois in 1889. It was by a divided court. The dissenting opinion unequivocally held that the property should be sold as a unit and without redemption. The case, however, turned on the construction of a statute of the State of Illinois which is entirely dissimilar to any statute of the State of Idaho. We refer to the case later.

Section 6930 of the Idaho code cited by counsel for the appellant as the statute under which it claims the right to redeem from the receiver's sale is part of Chapter 257 relating to "execution of the judgment in civil actions." It makes no reference whatever to sales by receivers.

Under the provisions of Section 6932 of the Idaho code property subject to redemption may be redeemed by "1. The judgment debtor, or his successor in interest, in the whole or any part of the property."

> "2. A creditor having a lien by judgment or mortgage on the property sold, or some share or part thereof, subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this section are, in this chapter, termed redemptioners."

In this case there is no one, not even the appellant, who answers the description of a judgment debtor. Neither is there any creditor having a lien by judgment or mortgage on the property sold subsequent to that on which the property was sold. It was not sold to satisfy any lien or encumbrance against it.

Furthermore: In Idaho as in other states where there is no right to redeem from sales of personal property, as was said by Mr. Justice Hawley in the case of the Pacific Northwest Packing Company vs. Allen, 116 Fed. 312:

"In such cases the auhtorities declare that the statute should receive a sensible construction; that the reason of the law in such cases should prevail over its letter," and held that, from the character, situation and surroundings it was necessary in the interest of all parties directly concerned that there should be no redemption.

Attention is called to the fact that the discussion involved in this action deals with what is called the statutory right of redemption, and not with what is denominated the equity of redemption. In the case of State vs. Stephens, 206 Pac. 1094, it was held that the statutory right of redemption is not property in any sense of the term, but a bare personal privilege.

In the case of Morrison vs. Burnette, 1907, 154 Fed. 617 at 624, Mr. Justice Sanborn speaking for the Circuit Court of Appeals for the Eighth Circuit announced the rights of the parties before and after confirmation of receiver's sale as follows:

> "The purchaser bids with full knowledge that the sale to him is subject to confirmation by the court, and that there is a power granted and a duty enforced upon the judicial tribunal when it comes to decide whether or not the sale shall be confirmed, to so exercise its judicial power as to secure for the owners of the property the largest practical returns. He is aware that his rights as a purchaser are subject to the exercise of this discretion. But after the sale is confirmed that discretion has been exercised. The power to sell and the power to determine the price at which the sale shall be made has been exhausted. From thenceforth the court and the successful bidder occupy the relation of vendor and purchaser in an executed sale, and nothing is sufficient to avoid it which would not set aside a sale of like character between private parties."

The situation presented to this court by the appellant is, in short, this: The appellant admits that in Idaho, under certain circumstances, a court of equity may order its receiver to sell without redemption. This fully admits the jurisdiction of the court in the case at bar.

With particular reference to the Locey Coal Mines case, 22 N. E. 503 cited above, counsel for the appellant devote four or five pages of their brief to a discussion of that case. We respectfully call attention to the opinion of the Illinois Supreme Court in the case of Blair vs. Illinois Steel Co., 159 Ill. 350 31 L. R. A. 269.

In the latter case the brief of counsel for appellant contained the following language:

> "The decree below directs the receiver to sell the property of the insolvent corporation without redemption, which is directly contrary to the decision in Locey Coal Mines vs. Chicago etc."

In considering the Locey case the following appears in the opinion of the court in the Blair case supra:

> "In our opinion the decision in Locey Coal Mines vs. Chicago, W. & V. Coal Co. 131 Ill. 9, 8 L. R. A. 598, does not control in this case. The decision there made was based on the statute, which expressly makes subject to the right of redemption all sales of real estate made 'by virtue of an execution, judgment, or decree of foreclosure of a mortgage, or the enforcement of a mechanic's lien, or vendor's lien, or for the payment of money.' The sale there involved was one ordered in a decree rendered upon a creditors' bill to enforce the collection of a judgment at law, and it was considered that the decree was one 'for the payment of money,' viz. the amount due on the complainants' judgment, and also considered that the creditors' bill was to be regarded a species of process for the execution and enforcement of a judgment at law. Here there was no decree of foreclosure and sale under the trust deed, even in favor of Mrs. Miller."

So that while the Locey case has been heretofore cited as authority on the proposition that a receiver cannot sell without allowing the right of redemption, it is not authority in the case at bar for the reason that, in substance and effect, the present action amounts to a creditors' suit for the purpose of winding up an insolvent corporation. The Blair case is cited in a note to 34 Cyc page 334, at the top of the first column of notes.

In Watkins vs. Minnesota Thresher Mfg. Co. 41 Minn. 150, 42 N. W. 862, it was held that the right of redemption is not incident to a sale by a receiver of an insolvent corporation appointed, under the statute, upon the return of an execution unsatisfied, to convert the entire corporate assets into money for the payment of a debt of the corporation.

The right of redemption is a special statutory privilege to be exercised only by the classes of persons mentioned in the statute.

Owen vs. Kilpatrick 11 *S.* 476 *at* 477.

It should be noted that the reason for making sales of property of public utilities without the right of redemption is not because of the fact that they are public utilities, but the true doctrine is that of necessity arising from the condition and character of the property, and, on account of its unity.

IV

THIRD PROPOSITION.

EVEN A FORECLOSURE SALE MAY, UNDER CERTAIN CIRCUMSTANCES, BE MADE WITHOUT REDEMPTION.

In support of this proposition it is only necessary to cite:

Continental etc. Bank vs. Corey Bros. Con. Co. 208 *Fed.* 976 *at* 984, 126 *C. C. A.* 64.

Concerning which the Circuit Court of Appeals, Ninth Circuit, said:

> "The court below had the power to make the decree and it was its duty to do so if under existing circumstances the equity of the case required it."

Pacific Northwest Pack. Co. vs. Allen, 9th Circuit 116 *Fed.* 312

Title Ins. & Trust Co. vs. California Dev. Co. (*Cal.*) 152 *Pac.* 542, 555.

V

FOURTH PROPOSITION.

INSTEAD OF INCREASING THE AMOUNT REQUIRED ON REDEMPTION UNDER THE STATUTE, THE COURT REDUCED THE AMOUNT.

On page 12 of the brief of the plaintiff in error appears what purports to be a copy of Sec. 6933 of the Idaho code. An important mistake was made in undertaking to quote the statute. It appears from the brief that on redemption of property being made there shall be paid to the purchaser the amount of his purchase with ten per cent INTEREST thereon in addition. The word "interest" does not appear in the Idaho statute. The correct quotation of the statute in this particular is as follows:

> "6933 (4492) Same: How made. The judgment debtor or redemptioner may redeem the property from the purchaser within one year after the sale on paying the purchaser the amount of his purchase with 10 per cent thereon in addition."

The amount which a redemptioner must pay on redemption above the purchase price is a straight penalty of 10 per

cent and the purchaser has the right to insist upon and collect this penalty in full if redemption is made one day after the sale or at any time within the year. It is not interest, but a penalty of a flat amount. A short computation will disclose to the court that the lower court undertook to lighten the burden of anyone who might redeem by reducing the penalty. The property was bid in at $800,000.00 so that if redemption had been made within the three months allowed to the plaintiff in error, three months interest on the purchase price at the rate given would have amounted to $14,000, plus $15,000 penalty; if the court had not made this special provision in favor of one who might redeem, the purchaser would have been entitled to receive ten per cent of the purchase price, or $80,000. So it appears that by the order of the court the amount required to be paid by the plaintiff in error, if it had redeemed the property, was reduced by $51,000 below what the purchaser would have been entitled to receive under the terms of the statute.

VI

FIFTH PROPOSITION.

THE UTAH-IDAHO SUGAR COMPANY WAS A COMPETENT BIDDER AT THE SALE.

The appellant contends that one of the vital questions to be decided in this appeal is whether an act of congress is nullified by the Utah-Idaho Sugar Company, charged with a violation of the provisions of the Federal Trade Act, appearing at the receiver's sale, purchasing the property of the Beet Growers Company, and receiving a receiver's deed therefor.

The order of the Federal Trade Commission referred to by appellant, was based upon a complaint which alleged a conspiracy by the Utah-Idaho Sugar Company and the other defendants in that case, in which, among other things,

an attempt was made to prevent the successful establishment of a sugar factory by the promoters of the Beet Growers Sugar Company. The evidence submitted in the lengthy hearing in that case is all based upon such allegations of conspiracy. The Federal Trade Commission, under date of October 3, 1923, entered its findings of fact and conclusions, and its order to desist, in which order it specifically enumerates the various things which the so-called conspirators are prohibited from doing.

No ingenuity of analysis can point to any one of the specific provisions of such order to prevent the action of the Utah-Idaho Sugar Company, as an individual Company, appearing at the receiver's sale and bidding for this property. The receiver's sale was duly advertised and was open to the public in general. The appellants endeavored to convince the lower court prior to the confirmation of the sale, that the purchaser was not a competent bidder and set up and discussed fully the terms of the order to desist made by the Federal Trade Commission.

The order of the Commission referred to, cited by appellants here, was made by three members of the Commission. A vigorous dissenting opinion from the minority of the Commission was rendered by Commissioners Van Fleet and Gaskill. (See printed transcript pp. 204-207). The reasoning of the dissenting opinion appears to be the better expression of the law. The Utah-Idaho Sugar Company is now prosecuting an appeal from the majority decision, such appeal being filed in the Circuit Court of the Eighth Judicial District. Appellants, in their brief, allege that, "no review was sought by the Utah-Idaho Company until after the objections were filed by the plaintiff in error on March 14, 1924. When these objections were filed and the right of the Utah-Idaho Company to become a purchaser in the receiver's sale was challenged, and when it became apparent that this right would be contested in this Honorable

Court, *"then a belated and hurried effort was made to secure a review in the Circuit Court of Appeals for the Eighth Circuit, and, as we are advised, the papers were filed upon the very last day allowed for the presentation of its petition for review."* (Appellants' brief pp. 44-45).

The record in the Federal Trade hearing referred to consisted of some 20,000 typewritten pages, together with innumerable exhibits, testimony having been taken in various parts of the United States over the period of one year. The appeal was filed in the Circuit Court of the Eighth District within six months from the date of the order to desist of the Federal Trade Commission. The Federal Trade Act provides no time within which appeals shall be taken from its various orders or decrees. The Federal Trade Commission itself, we understand, has never required that appeals from its orders must be prosecuted within the six months provided in the Judiciary Act. In fact, a careful reading of the Act itself leaves no doubt but that appeals may be taken from the Commission's orders at any time. The Utah-Idaho Sugar Company, however, did appeal within six months, and such appeal was filed in spite of the voluminous and lengthy record of such hearing, and is now being perfected. Appellant's insinuation, therefore, in the foregoing quotation from its brief that such appeal was taken because of the fact that the right to purchase this property would be contested in this Court, is without basis of reason or fact.

The Federal Trade Commission Act further provides for the specific procedure in which to carry out the terms and conditions of any orders or decrees which it may issue. In the event its orders are not carried out complaint should be made to the Commission itself, and such Commission has the proper power and authority under the procedure set forth in the Act to punish accordingly. The appellant, therefore, in event the Commission's order has not been

compiled with by the Utah-Idaho Sugar Company purchasing this factory, have their proper way of proceeding to prevent such, and certainly this Court will not now place itself in the position of the Commission to determine whether or not its, the Commission's, orders, have been complied with. It would be similar to this Court attempting to pass upon the question as to whether or not contempt of an order of the Federal Court of the Eighth District had been committed by some defendant in a case tried before that particular Court.

We are reliably informed that the appellant, or some one of its officers, did make complaint to the Federal Trade Commission subsequent to the time of the purchase of this factory by the Utah-Idaho Sugar Company at the receiver's sale. This complaint was based upon the fact that the Utah-Idaho Sugar Company by bidding at such sale was flying in the teeth of the orders of the Commission. Request was made that the Commission take some action against the Utah-Idaho Company. The Commission replied that there was nothing in the action of the purchaser in bidding for this factory, or taking deed to it from the receiver, which in any way infringed the orders of the Commission; that this was purely an *intra-state* matter, had nothing to do with *interstate* commerce, and that the Federal Trade Commission was entirely without jurisdiction in the matter.

The basis of the Federal Trade case referred to against the Utah-Idaho Company is conspiracy. Certainly appellant does not allege that there was any conspiracy with the other defendants in that case, in the Utah-Idaho Company bidding for and purchasing this factory. Do appellants believe as they ingeniously insinuate, that there was a conspiracy between the Federal Court or the receiver and the purchaser to bring about the "*culmination of the plans and purposes of said Company to destroy plaintiff in error as an independent competitor and put it as such competitor out of business.*" (Appellants' brief pp. 37).

The Beet Growers Sugar Company was already out of business as a going concern at the time of the sale and nothing which the Utah-Idaho Sugar Company did or could do as a bidder or purchaser, in any way furthered or aided the failure or insolvency of said Company. The Beet Growers Company had ceased to function shortly after July 1, 1922, when plaintiff filed its complaint in the present action.

Attention is respectfully directed to the paragraph numbered four, page 200 of the printed transcript, which is a part of the order of the Federal Trade Commission to cease and desist. This order forbids the Utah-Idaho Company "to purchase land and erect factories," when "such purchases or erections are not done in good faith." In order to uphold appellant in its position that the Utah-Idaho Company was not a competent bidder, other questions aside, this Court must find that the purchaser did not act in good faith.

No proof of any fact was offered in the lower court at the hearing on the receiver's report of his sale. So that there is nothing in the record tending to establish want of good faith.

CONCLUSION

It is respectfully submitted that appellant has come short of showing any error in the proceedings appealed from, and that the judgment of the District Court for the State of Idaho in the premises should be affirmed and the said appeal dismissed with costs to the appellee as provided by the rules and practice of this court.

Respectfully submitted,

OTTO E. MCCUTCHEON,
O. E. MCCUTCHEON,
Attorneys for Defendant in Error, A. V. Scott, Receiver.

INDEX AND TABLE OF AUTHORITIES CITED.

List of Authorities Cited:

No. 4252

United States

Circuit Court of Appeals

For the Ninth Circuit.

WILLIAM L. SCRIBNER, ALICE SCRIBNER, and LOTTIE POWELL,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL.

ADAM BEELER, Esq., Attorney at Law, 1808 L. C. Smith Building, Seattle, Washington,
Attorney for Plaintiff in Error.

THOS. P. REVELLE, Esq., United States District Attorney, 310 Federal Building, Seattle, Washington,
Attorney for Defendant in Error. [1*]

United States District Court, Western District of Washington, Northern Division.
May, 1923, Term.

No. 7795.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WILLIAM L. SCHRIBNER, ALICE SCHRIBNER, LOTTIE POWELL, *alias* LOTTIE LYNN, and VERA HARPER,
Defendants.

INFORMATION.

BE IT REMEMBERED, That Thos. P. Revelle, Attorney of the United States of America for the Western District of Washington, who for the said United States in this behalf prosecutes in his own person, comes here into the District Court of the

*Page-number appearing at foot of page of original Certified Transcript of Record.

said United States for the District aforesaid on this 18th day of July, in this same term, and for the said United States gives the Court here to understand and be informed that as appears from the affidavit of W. M. Whitney, made under oath, herein filed: [2]

COUNT I.

That on the fifth day of July, in the year of our Lord one thousand nine hundred and twenty-three, at the city of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, William L. Schribner, Alice Schribner, Lottie Powell, *alias* Lottie Lynn, and Vera Harper, then and there being, did then and there knowingly, willfully, and unlawfully have and possess certain intoxicating liquor, to wit, sixteen (16) ounces of a certain liquor known as whiskey, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said United States Attorney unknown, intended then and there by the said WILLIAM L. SCHRIBNER, ALICE SCHRIBNER, LOTTIE POWELL, *alias* LOTTIE LYNN, and VERA HARPER, for use in violating the Act of Congress passed October 28, 1919, known as the National Prohibition Act, by selling, bartering, exchanging, giving away, and furnishing the said intoxicating liquor, which said possession of the said intoxicating liquor by the said William L. Schribner, Alice Schribner, Lottie Powell, *alias* Lottie Lynn, and

Vera Harper, as aforesaid, was then and there unlawful and prohibited by the Act of Congress known as the National Prohibition Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [3]

And the said United States Attorney for the said Western District of Washington further informs the Court:

COUNT II.

That on the 5th day of July, in the year of our Lord one thousand nine hundred and twenty-three, at the city of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, WILLIAM L. SCHRIBNER, ALICE SCHRIBNER, LOTTIE POWELL, *alias* LOTTIE LYNN, and VERA HARPER, then and there being, did then and there knowingly, willfully, and unlawfully sell certain intoxicating liquor, to wit, sixteen ounces of a certain liquor known as whiskey, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said United States Attorney unknown, and which said sale by the said William L. Schribner, Alice Schribner, Lottie Powell, *alias* Lottie Lynn, and Vera Harper, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act; contrary to the form of the statute in such case made

and provided, and against the peace and dignity of the United States of America. [4]

And the said United States Attorney for the said Western District of Washington further informs the Court:

COUNT III.

That on the sixth day of July, in the year of our Lord one thousand nine hundred and twenty-three, at the city of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, WILLIAM L. SCHRIBNER, ALICE SCHRIBNER, LOTTIE POWELL, *alias* LOTTIE LYNN, and VERA HARPER, then and there being, did then and there knowingly, willfully, and unlawfully sell certain intoxicating liquor, to wit, eight (8) ounces of a certain liquor known as whiskey, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said United States Attorney unknown, and which said sale by the said William L. Schribner, Alice Schribner, Lottie Powell, *alias* Lottie Lynn, and Vera Harper, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [5]

And the said United States Attorney for the said

Western District of Washington further informs the Court:

COUNT IV.

That on the sixth day of July, in the year of our Lord one thousand nine hundred and twenty-three, at the city of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, and at a certain place situated at 201½ Second Avenue South, known as the Star Rooms, in the said city of Seattle, WILLIAM L. SCHRIBNER, ALICE SCHRIBNER, LOTTIE POWELL, *alias* LOTTIE LYNN, and VERA HARPER, then and there being, did then and there and therein knowingly, willfully, and unlawfully conduct and maintain a common nuisance by then and there manufacturing, keeping, selling, and bartering intoxicating liquors, to wit, whiskey and other intoxicating liquors containing more than one-half of one per centum of alcohol by volume and fit for use for beverage purposes, and which said maintaining of such nuisance by the said William L. Schribner, Alice Schribner, Lottie Powell, *alias* Lottie Lynn, and Vera Harper, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THOMAS P. REVELLE,
United States Attorney.
CHARLES P. MORIARTY,
Special Assistant United States Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. July 18, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [6]

AFFIDAVIT OF W. M. WHITNEY.

United States of America,
Western District of Washington,
Northern Division,—ss.

W. M. Whitney, being first duly sworn, on oath deposes and says: That he is a Federal Prohibition Agent, and as such makes this affidavit on behalf of the United States of America:

That on the 5th day of July, 1923, at 201½ Second Avenue South, known as the Star Rooms, in the city of Seattle, in the Northern Division of the Western District of Washington, William L. Schribner, Alice Schribner, Lottie Powell, *alias* Lottie Lynn, and Vera Harper, had and possessed sixteen (16) ounces of a certain liquor known as whiskey;

That at said time and place said William L. Schribner, Alice Schribner, Lottie Powell, *alias* Lottie Lynn, and Vera Harper sold and delivered to affiant and one J. M. Simmons sixteen (16) ounces of said liquor, who purchased and received same;

That on the 6th day of July, 1923, at said 201½ Second Avenue South, in the said city of Seattle, said William L. Schribner, Alice Schribner, Lottie Powell, *alias* Lottie Lynn, and Vera Harper, sold and delivered to affiant and said J. M. Simmons, who purchased and received the same, eight (8) ounces of a certain liquor known as whiskey;

That by reason of the facts hereinabove set forth, the said William L. Schribner, Alice Schribner, Lottie Powell, *alias* Lottie Lynn, and Vera Harper, on the said 6th day of July, 1923, at said 201½ Second Avenue South, in the said city of Seattle, conducted and maintained a common nuisance.

W. M. WHITNEY.

Subscribed and sworn to before me this 17th day of July, 1923.

[Seal] FRANK L. CROSBY, Jr.,
Deputy Clerk U. S. District Court, Western District of Washington.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. July 18, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [7]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7795.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM L. SCHRIBNER, ALICE SCHRIBNER, LOTTIE POWELL, and VERA HARPER,

Defendants.

ARRAIGNMENT AND PLEA.

Now, on this 29th day of October, 1923, the above defendants come into open court for arraignment accompanied by their attorney, Adam Beeler, and say that their true names are William L. Scribner, Alice Scribner, Lottie Powell and Vera Harper. Whereupon each defendant here and now enters their plea of not guilty.

Journal No. 11, page No. 363. [8]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7795.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WILLIAM L. SCRIBNER, ALICE SCRIBNER, LOTTIE POWELL, and VERA HARPER,
Defendants.

TRIAL.

Now, on this 20th day of December, 1923, all defendants come into open court with Adam Beeler and J. M. Boyle, Jr., their attorneys, and with C. T. McKinney present in behalf of the Government. A jury is empaneled and sworn as follows: Roy W. Bell, John Z. Bayless, C. C. Sovde, Andrew Peirson, Charles C. Settle, Lowell F. Struthers, Hugh Allen,

Martin L. Jones, Louis W. Dettmer, Charles E. Bogardus, Frank W. Blair, and L. A. Walls. Upon motion of Adam Beeler, attorney for defendants, all witnesses were ordered excluded from the courtroom except when testifying. Opening statement is made to the jury for the Government by C. T. McKinney. Government witnesses are sworn and examined as follows: J. M. Simmons, W. M. Whitney, Walter M. Justi and C. W. Kline. Government Exhibits Numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 are introduced as evidence. Government rests.

Whereupon court stands adjourned to December 21, 1923, at 10 A. M.

Journal 11, page 462. [9]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7795.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM L. SCRIBNER, ALICE SCRIBNER, LOTTIE POWELL, and VERA HARPER,

Defendants.

TRIAL RESUMED—REVISION OF PLEA.

Now, on this 21st day of December, 1923, all defendants in this cause being present and all jurors, trial is resumed. Defendant Vera Harper at this time withdraws her plea of not guilty heretofore

made on Counts I, II, and III, and enters a plea of guilty to said Counts I, II and III. Defendant Harper also moves that Count IV be withdrawn from the jury as to her, which motion is denied and exception allowed. Defendants William L. Scribner and Alice Scribner move that all counts of the information be withdrawn from the consideration of the jury as to them. Which motion is denied and exception allowed.

Opening statement is made to the jury for defendants by Adam Beeler. Defendant's witnesses are sworn and examined as follows: Vera Harper, Pearl Riley, Alice Scribner, William L. Scribner, and Lottie Powell. Government's Exhibits Numbered 11, 12, and 13, are identified but withdrawn. Defendant rests. Said cause is now argued to the jury by attorneys for both sides and the jury after being instructed by the Court, retire for deliberation. It is stipulated in open court by attorneys for both sides and the defendants that a sealed verdict may be returned at 10 A. M. to-morrow. Journal 11, page 464. [10]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7795.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM L. SCRIBNER, ALICE SCRIBNER, LOTTIE POWELL, and VERA HARPER,

Defendants.

TRIAL RESUMED—VERDICT RETURNED.

Now, on this 22d day of December, 1923, all defendants and attorneys for both sides are present. Jury is called and all are present. A verdict is returned and reads as follows: "We, the jury, in the above-entitled cause, find the defendant, William L. Scribner, is guilty as charged in Count I of the information herein; and further find the defendant, Alice Scribner, is guilty as charged in Count I of the information herein; and further find the defendant, Lottie Powell, not guilty as charged in Count I of the information herein; and further find the defendant, William L. Scribner, is guilty as charged in Count II of the information herein; and further find the defendant, Alice Scribner, is guilty as charged in Count II of the information herein; and further find the defendant, Lottie Powell, not guilty as charged in Count II of the information herein; and further find the defendant, William L. Scribner, is guilty as charged in Count III of the information herein; and further find the defendant, Alice Scribner, is guilty as charged in Count III of the information herein; and further find the defendant, Lottie Powell, is guilty as charged in Count III of the information herein; and further find the defendant, William L. Scribner, not guilty as charged in Count IV of the information herein; and further find the defendant, Alice Scribner, not guilty as charged in Count IV of the information herein; and further find the defendant, Lottie Powell, not guilty as charged in Count IV of the information herein; and

further find the defendant, Vera Harper, not guilty as charged in Count IV of the information herein. John Z. Bayless, Foreman. Verdict is ordered filed and sentence is set for January 7, 1924. Defendants are allowed to go on present bail.

Journal No. 11, page 472. [10½]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7795.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM L. SCRIBNER, ALICE SCRIBNER, LOTTIE POWELL, and VERA HARPER,

Defendants.

VERDICT.

We, the jury in the above-entitled cause, find the defendant, William L. Scribner, is guilty as charged in Count I of the information herein; and further find the defendant, Alice Scribner, is guilty as charged in Count I of the information herein; and further find the defendant, Lottie Powell, not guilty as charged in Count I of the information herein; and further find the defendant, William L. Scribner, is guilty as charged in Count II of the information herein; and further find the defendant, Alice Scribner, is guilty as charged in Count III of the information herein; and further find the defendant,

Lottie Powell, not guilty as charged in Count II of the information herein; and further find the defendant, William L. Scribner, is guilty as charged in Count III of the information herein; and further find the defendant, Vera Harper, not guilty as charged in Count III of the information herein; and further find the defendant, Lottie Powell, is guilty as charged in Count III of the information herein; and further find the defendant, William L. Scribner, not guilty as charged in Count IV of the information herein; and further find the defendant, Alice Scribner, not guilty as charged in Count IV of the information herein; and further find the defendant, Lottie Powell, not guilty as charged in Count IV of the information herein; and further find the defendant, Vera Harper, not guilty as charged in Count IV of the information herein.

JOHN Z. BAYLESS,
Foreman.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. December 22, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [11]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7795.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM L. SCRIBNER, ALICE SCRIBNER, LOTTIE POWELL, *alias* LOTTIE LYNN, and VERA HARPER,

Defendants.

MOTION IN ARREST OF JUDGMENT AND ALTERNATIVE MOTION FOR NEW TRIAL.

Comes now William L. Scribner and Alice Scribner, defendants in the above-entitled cause, by their attorney, Adam Beeler, and hereby move the Court to enter an order in arrest of judgment as to said defendants on the following grounds and reasons:

I.

That the verdict of the jury finding said two named defendants guilty on Counts I, II and III contained in the information in the above-entitled case is inconsistent with the verdict of not guilty rendered and returned by the jury against said two herein named defendants on Count IV of the said information.

In the event that above and foregoing motion is by the Court denied, then said defendants move

the Court that an order be entered in the above-entitled cause awarding to said named defendants a new trial on the following grounds and reasons, to wit:

I.

Irregularity in the proceedings of the court and abuse of discretion by which said herein named defendants, and each of them, were deprived from having a fair trial.

II.

Accident or surprise which ordinary prudence could not have guarded against.

III.

Newly discovered evidence, material for the said named [12] defendants making this application which could not with reasonable diligence have been discovered and produced at the time of the trial.

IV.

Insufficiency of the evidence to justify the verdict and that it is against the law.

V.

Error in law occurring at the trial and excepted to at the time by the hereinabove named defendants making this application.

Dated this 24th day of December, 1923.

ADAM BEELER,
Attorney for Defendants.

Received copy December 24, 1923.

THOS. P. REVELLE.

[Endorsed]: Filed in the United States District Court, Western District of Washington, North-

ern Division. December 24, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [13]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7795.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM L. SCRIBNER, ALICE SCRIBNER, LOTTIE POWELL, *alias* LOTTIE LYNN, and VERA HARPER,

Defendants.

MOTION FOR NEW TRIAL.

Comes now the defendant, Lottie Powell, and hereby moves the Court that she be awarded a new trial on the following grounds and reasons to wit:

I.

Irregularity in the proceedings of the Court and abuse of discretion by which said defendant was deprived from having a fair trial.

II.

Accident or surprise which ordinary prudence could not have guarded against.

III.

Newly discovered evidence, material for the said defendant making this application which could not

with reasonable diligence have been discovered and produced at the time of the trial.

IV.

Insufficiency of the evidence to justify the verdict and that it is against the law.

V.

Error in law occurring at the trial and excepted to at the time by the defendant making this application.

Dated this 24th day of December, 1923.

ADAM BEELER,
Attorney for Defendant.

Received copy December 24, 1923.

THOS. P. REVELLE,
U. S. Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. December 24, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [14]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7795.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WILLIAM L. SCHRIBNER, ALICE SCHRIBNER, LOTTIE POWELL, and VERA HARPER,
Defendants.

DECISION.

(On Motion in Arrest of Judgment and for New Trial.)

Filed January 31, 1924.

THOMAS P. REVELLE, U. S. Attorney, C. T. McKINNEY, Asst. U. S. Attorney, Attorneys for Plaintiff.

ADAM BEELER, Esq., and J. M. BOYLE, Jr., Attorneys for Defendants.

NETERER, D. J.—The defendants move in arrest of judgment and also for a new trial. The information charges possession of liquor on Count I; Count II charges sale on July 5th; Count III charges sale July 6th, and Count IV maintenance of a common nuisance. A jury found the defendants Scribner and wife guilty on Counts I, II and III, and not guilty on Count IV, and found the defendant Lottie Powell not guilty on Counts I and II, and not guilty on Count IV. During the progress of the trial the defendant Vera Harper pleaded guilty to Counts I, II and III.

The contention that the verdict of the jury is inconsistent, in that it found the defendants not guilty of maintaining a nuisance, while finding them guilty of possession and sale, and that if guilty of possession and sale the defendants must be guilty of maintaining a nuisance, and if not guilty of maintaining a nuisance they were not guilty of possession and sale, is untenable.

The jury were instructed, among other things, that a public nuisance is a nuisance which annoys such portion of the public as necessarily comes in contact with it; "anything not authorized by law which maketh hurt." The jury could very well find that possession of liquor and its sale was conducted in such a way that it would not come under the definition of nuisance as given. Section 1015, Bishop, New Criminal Procedure.—Kuch vs. State, 99 S. E. 622; Commonwealth vs. Hoskins, 128 Mass. 60; State vs. Hendrick, 78 S. W. 630; Samlin vs. U. S., 278 Fed. 170; Rosenthal vs. U. S., 276 Fed. 714; Baldini vs. U. S., 286 Fed. 133, have no application, Bilboa vs. U. S., 287 Fed. 125. The motion in arrest of judgment is denied. [15]

The ground of the motion for new trial urged is error of law occurring at the trial and excepted to by the defendants; it is said that the Court refused the defendants permission to show that witness J. A. Simmons for the Government "was arrested and placed in the city jail for being drunk," and also for refusing to strike from the testimony of witness Whitney the expression that certain rooms are *serving rooms,* and not permitting further cross-examination of Government witness Walter M. Justi.

Witness Simmons was cross-examined with relation to money taken from some of the defendants, and then was asked the question "You are addicted to drinking yourself, are you not"? The objection to this question was sustained, and I think rightfully so. If the inquiry had been as to

whether the defendant was intoxicated at the time, it would have bearing upon his credibility as a witness, but to ask the witness whether he was addicted to drinking, purely a collateral matter, could under no authority be permissible. The State Supreme Court in State vs. Coella, 3 Wash. 99, held that a woman may be asked on cross-examination whether she is a common prostitute, for the reason that if she chose to answer and admit if such was the fact, that she had wantonly violated the restraints and passed outside the limits which religion, society and the law have long established for women's welfare and protection, her testimony would have been seriously impaired. But the circumstances disclosed here do not bring the inquiry within the rule announced. The witness Simmons did testify as to the number of drinks that were bought and drank while he was there.

Witness Whitney, in describing his entry into the building of the defendants and the premises said: "There are four serving rooms along there, right alongside of this hallway." Question: "How are those rooms furnished, Mr. Whitney?" Objection made and overruled. Counsel for defendants then said: "I ask that the testimony of the witness to the effect that these were four serving rooms be stricken." The motion was denied. The objection was made to the question as to how the rooms were furnished; the rooms were fully described by the witness; the jury had all of the facts upon which to conclude as to the character of the rooms that the witness had, and the Court did tell

the jury that it was not bound by his conclusion but it was for the jury to conclude what the rooms were used for.

The ruling of the Court to the questions in cross-examination of witness Justi was correct. Justi, on direct examination, testified as to how long he had been in the service and of his presence at the premises July 6th assisting in the search of the building on the 3d floor, and particularly the kitchen, and when cross-examined upon the particular things which he did, he was asked who accompanied him down to the Star Hotel. The objection to this question was sustained. An objection to the question: "Was Mr. Simmons upstairs with Mr. Whitney?" was also sustained. The witness had already stated that no one was upstairs at the time that he searched the place except Agent Whitney, who "came in just about the time I [16] opened the ice box." Question: "Was nobody there besides you and Whitney?" Answer: "No, not when I found the beer." Question: "Did you see the defendant Mr. Schribner?" Answer: "Yes." Question: "Was he up in his room or was he downstairs?" Answer: "He was on the second floor." Question: "Was Mr. Whitney the only one that was with you?" Objection was made and the Court said: "He has answered the question before." An exception was noted.

The fullest cross-examination of Justi was permitted within the rules of evidence. Cross-examination is for the purpose of testing the truthfulness, intelligence, memory, bias, or interest of a

witness, and any question to that end within reason was here allowed. The most strenuous argument is presented to the Court's ruling declining to permit Justi to be examined with relation to the Whitney and Simmons testimony for the purpose of discrediting it. This clearly was improper. The motion is denied.

NETERER,
U. S. District Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. January 31, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [17]

United States District Court, Western District of Washington, Northern Division.

No. 7795.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALICE SCRIBNER,

Defendant.

SENTENCE (ALICE SCRIBNER).

Comes now on this 4th day of February, 1924, the said defendant Alice Scribner into open court for sentence and being informed by the Court of the charges herein against her and of her conviction of record herein, she is asked whether she has any

legal cause to show why sentence should not be passed and judgment had against her and she nothing says save as she before hath said. Wherefore by reason of the law and the premises, it is considered, ordered and adjudged by the Court that the defendant is guilty of violating the National Prohibition Act and that she be punished by being imprisoned in the King County Jail or in such other prison as may be hereafter provided for the confinement of persons convicted of offenses against the laws of the United States for the period of six months on count III of the information and to pay a fine of $500.00 *dollars* on Counts I and II of the information taken together. And the said defendant Alice Scribner is hereby remanded to the custody of the United States Marshal to carry this sentence into execution.

Judgment & Decree Book, Vol. 4. [18]

United States District Court, Western District of Washington, Northern Division.

No. 7795.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOTTIE POWELL,

Defendant.

SENTENCE (LOTTIE POWELL).

Comes now on this 4th day of February, 1924, the

said defendant Lottie Powell into open court for sentence and being informed by the Court of the charges herein against her and of her conviction of record herein she is asked whether she has any legal cause to show why sentence should not be passed and judgment had against her and she nothing says save as she before hath said. Wherefore, by reason of the law and the premises, it is considered, ordered and adjudged by the Court that the defendant is guilty of violating the National Prohibition Act and that she be punished by being imprisoned in the King County Jail or in such other prison as may be hereafter provided for the confinement of persons convicted of offenses against the laws of the United States for the period of six months on Count III of the information. And the said defendant Lottie Powell is now hereby remanded to the custody of the United States Marshal to carry this sentence into execution.

Judgment & Decree Book, Vol. 4. [19]

United States District Court, Western District of Washington, Northern Division.

No. 7795.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM L. SCRIBNER,

Defendant.

SENTENCE (WILLIAM L. SCRIBNER).

Comes now on this 4th day of February, 1924, the said defendant William L. Scribner into open court for sentence and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him and he nothing says save as he before hath said. Wherefore by reason of the law and premises, it is considered ordered and adjudged by the court that the defendant is guilty of violating the National Prohibition Act and that he be punished by being imprisoned in the King County jail or in such other prison as may be hereafter provided for the confinement of persons convicted of offenses against the laws of the United States for the period of six months on Count III of the information and to pay a fine of $750.00 dollars on Counts I and II taken together and the defendant is hereby remanded into the custody of the United States marshal to carry this sentence into execution.

Judgment & Decree Book, Vol. 4. [20]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7795.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOTTIE POWELL,

Defendant.

PETITION FOR WRIT OF ERROR (LOTTIE POWELL).

To the Above-entitled Court and to the Honorable JEREMIAH NETERER, Judge Thereof:

Comes now the above-named defendant, Lottie Powell, by her attorney, Adam Beeler, and shows that on December 21st, 1923, a jury impanelled in the above-entitled court and cause returned a verdict finding the above-named defendant guilty on count three of the information theretofore filed in the above-entitled court and cause, and thereafter within the time limited by law under the rules of this court, the defendant moved for a new trial, which said motion was by the Court overruled and an exception thereto allowed; and thereafter on the 4th day of February, 1924, the defendant was by order and judgment and sentence of the above-entitled court in said cause, sentenced as follows:

On Count III of the information to be imprisoned

for six months in the King County jail of the State of Washington.

And, your petitioner herein feeling herself aggrieved by said verdict, judgment and sentence of the court entered herein, as aforesaid, and by the orders and rulings of said court and proceedings in said cause, now herewith petitions this Court for an order allowing her to prosecute a writ of error from said judgment and sentence to the Circuit Court of Appeals of the United States for the Ninth Circuit, under the laws of the United States, and in accordance with the procedure of said court made and provided, to the end that the said proceedings as herein recited, and as more fully set forth in the assignments of error presented herein, may be reviewed and the manifest error appearing on the face of the record [21] of said proceedings, and upon the trial of said cause, may be by said Circuit Court of Appeals corrected, and that for said purpose a writ of error and citation thereon should issue as by law and the ruling of the court provided.

WHEREFORE, the premises considered, your petitioner prays that a writ of error issue to the end that said proceedings of the District Court of the United States for the Western District of Washington, Northern Division, may be reviewed and corrected; said error in said record being herein assigned and presented herewith, and that pending the final determinagtion of said writ of error by said Appellate Court, an order may be entered herein that all further proceedings be suspended

and stayed, and that pending such final determination that said defendant be admitted to bail.

ADAM BEELER,
Attorney for Petitioner.

Acceptance of service of the within petition for writ of error, accepted this 11th day of February, 1924.

THOS. P. REVELLE,
Attorney for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. February 11, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [22]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7795.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WILLIAM L. SCRIBNER and ALICE SCRIBNER,
Defendants.

PETITION FOR WRIT OF ERROR (WILLIAM L. SCRIBNER and ALICE SCRIBNER).

To the Above-entitled Court and to the Honorable JEREMIAH NETERER, Judge Thereof:

Comes now the above-named defendants, by their

attorney, Adam Beeler, and show that on December 21st, 1923, a jury impaneled in the above-entitled court and cause returned a verdict finding the above-named defendants guilty on counts one, two and three of the information theretofore filed in the above-entitled court and cause, and thereafter within the time limited by law under the rules of this court, the defendants moved in arrest of judgment and also moved for a new trial, which said motions were by the Court overruled and an exception thereto allowed; and thereafter on the 4th day of February, 1924, the defendants, and each of them, were by order and judgment and sentence of the above-entitled court in said cause, sentenced as follows:

On Counts I and II of the information, constituting but a single offense, the defendant, Alice Scribner, to pay a fine of $500.00; and the defendant, William L. Scribner, to pay a fine of $750.00.

On Count III of the information to be imprisoned for six months in the King County jail of the State of Washington.

And, your petitioners herein, feeling themselves aggrieved by said verdict, judgment and sentence of the Court entered herein, as aforesaid, and by the orders and rulings of said Court and proceedings in said cause, now herewith petition this Court for an order allowing them to prosecute a writ of error from said judgment and sentence to the [23] Circuit Court of Appeals of the United States for the Ninth Circuit, under the laws of the United States, and in accordance with the procedure of said court made and provided, to the end that the said proceed-

ings as herein recited, and as more fully set forth in the assignments of error presented herein, may be reviewed and the manifest error appearing on the face of the record of said proceedings, and upon the trial of said cause, may be by said Circuit Court of Appeals corrected, and that for said purpose a writ of error and citation thereon should issue as by law and the ruling of the Court provided.

WHEREFORE, the premises considered, your petitioners pray that a writ of error issue to the end that said proceedings of the District Court of the United States for the Western District of Washington, Northern Division, may be reviewed and corrected; said error in said record being herein assigned and presented herewith, and that pending the final determination of said writ of error by said Appellate Court, an order may be entered herein that all further proceedings be suspended and stayed, and that pending such final determination that said defendants be admitted to bail.

ADAM BEELER,
Attorney for Petitioners.

Acceptance of service of the within petition for writ of error, accepted this 5th day of February, 1924.

THOMAS P. REVELLE,
Attorney for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. February 5, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [24]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7795.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOTTIE POWELL,

Defendant.

ASSIGNMENT OF ERRORS (LOTTIE POWELL).

Comes now the above-named defendant, Lottie Powell, and in connection with her petition for a writ of error in this case submitted and filed herewith, assigns the following errors which the defendant avers and says occurred in the proceedings and at the trial of the above-entitled cause, and in the above-entitled court, and upon which she relies to reverse, set aside and correct the judgment and sentence entered herein, and says that there is manifest error appearing upon the face of the record, and in the proceedings, in this:

1. That during the progress of the trial a witness produced on behalf of the Government testified that certain rooms in the premises in which the defendant was arrested and in which the violation of the law is alleged to have occurred, were "serving rooms"; that the defendant requested the conclusion of the witness that said rooms were "serving rooms" be stricken, which request was by the Court denied

and an exception was duly noted, and now the defendant assigns as error the ruling of the Court upon such motion to strike.

II. That during the progress of the trial Walter M. Justi, a witness was produced on behalf of the Government, and the defendant was by the Court unduly restricted and limited in her cross-examination of said witness, to which ruling of the Court the defendant then and there duly excepted and the exception was by the Court allowed, and now the defendant assigns as error the ruling of the Court upon such cross-examination.

III. Thereafter, and within the time limited by law and the orders and ruling of this Court, the defendant moved the Court for an order granting to her a new trial, which motion was denied by the Court, to [25] which ruling of the Court the defendant duly excepted, and the exception was by the Court allowed, and now the defendant assigns as error the ruling of the Court upon said motion.

And as to each and every assignment of error, as aforesaid, the defendant says that at the time of making of the order or ruling of the Court complained of, the defendant duly asked and was allowed an exception to the ruling and order of the Court.

ADAM BEELER,
Attorney for Defendant.

Acceptance of service of the within assignment of errors, accepted this 11th day of February, 1924.

THOMAS P. REVELLE,
Attorney for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. February 11, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [26]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7795.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM L. SCRIBNER and ALICE SCRIBNER,

Defendants.

ASSIGNMENT OF ERRORS (WILLIAM L. SCRIBNER AND ALICE SCRIBNER).

Comes now the above-named defendants, William L. Scribner and Alice Scribner, and in connection with their petition for a writ of error in this case submitted and filed herewith, assigns the following errors which the defendants aver and say occurred in the proceedings and at the trial in the above-entitled cause, and in the above-entitled court, and upon which they rely to reverse, set aside and correct the judgment and sentence entered herein, and say that there is manifest error appearing upon the face of the record, and in the proceedings, in this:

I. That the defendants, within the time limited by law under the rules of this court moved in arrest

of judgment, which motion was denied by the Court, and to which ruling the defendants duly excepted; said motion in arrest of judgment was based upon the ground that the verdict of the jury was inconsistent, for the reason that the jury finding said defendants guilty on counts one, two and three of the information could not stand with the jury's finding the said defendants not guilty on count four of said information, for the reason that the same transaction, the same facts and the same evidence was relied upon by the Government in seeking a conviction under count four as under counts one, two and three of the information, and that if guilty of possession and sale, the defendants must necessarily be guilty of maintaining a nuisance, and if not guilty of maintaining a nuisance were not guilty of possession and sale, which exception was by the Court allowed and now the defendants assign as error the ruling of the Court upon said motion.

II. That during the progress of the trial a witness produced on behalf of the Government testified that certain rooms in the premises in [27] which the defendants were arrested and in which the violation of the law is alleged to have occurred, were "serving-rooms"; that the defendants requested the conclusion of the witness that said rooms were "serving-rooms" be stricken, which request was by the Court denied and an exception was duly noted, and now the defendants assign as error the ruling of the Court upon such motion to strike.

III. That during the progress of the trial Walter M. Justi, a witness, was produced on behalf of the

Government, and the defendants were by the Court unduly restricted and limited in their cross-examination of said witness, to which ruling of the Court the defendants then and there duly excepted and the exception was by the Court allowed, and now the defendants assign as error the ruling of the Court upon such cross-examination.

IV. Thereafter, and within the time limited by law and the orders and ruling of this Court, the defendants moved the Court for an order granting to them a new trial, which motion was denied by the Court, to which ruling of the Court the defendants duly excepted, and the exception was by the Court allowed, and now the defendants assign as error the ruling of the Court upon said motion.

And as to each and every assignment of error, as aforesaid, the defendants say that at the time of making of the order or ruling of the Court complained of, the defendants duly asked and were allowed an exception to the ruling and order of the Court.

ADAM BEELER,
Attorney for Defendants.

Acceptance of service of the within assignment of errors, accepted this 5th day of February, 1924.

THOMAS P. REVELLE,
Attorney for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. February 5, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [28]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7795.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOTTIE POWELL,

Defendant.

ORDER ALLOWING WRIT OF ERROR (LOTTIE POWELL).

A writ of error is granted this 11th day of February, 1924, and it is further ORDERED that pending the review herein, said defendant be admitted to bail and that the defendant, Lottie Powell's supersedeas bond be fixed at $1,500.00; and it is further

ORDERED, that upon said defendant, Lottie Powell filing her bond in the aforesaid sum in due form, to be approved by the clerk of this court, she shall be released from custody pending the determination of the writ of error herein assigned.

Done in open court this 11th day of February, 1924.

JEREMIAH NETERER,
Judge.

Received a copy of the above order this 11th day of February, 1924.

THOS. P. REVELLE,
Attorney for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. February 11, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [29]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7795.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM L. SCRIBNER and ALICE SCRIBNER,

Defendants.

ORDER ALLOWING WRIT OF ERROR (WILLIAM L. SCRIBNER AND ALICE SCRIBNER).

A writ of error is granted this 5th day of February, 1924, and it is further ORDERED that pending the review herein, said defendants be admitted to bail and that the defendant, William L. Scribner's supersedeas bond be fixed at $2,250.00, and the defendant, Alice Scribner's supersedeas bond be fixed at $2,000.00; and it is further

ORDERED, that upon said defendants, William L. Scribner and Alice Scribner, each filing their bond in the aforesaid sum in due form, to be approved by the clerk of this court, they shall be re-

leased from custody pending the determination of the writ of error herein assigned.

Done in open court, this 5th day of February, 1924.

JEREMIAH NETERER,
Judge.

Received a copy of the above order this 5th day of February, 1924.

THOMAS P. REVELLE,
Attorney for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. February 5, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [30]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7795.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WILLIAM L. SCRIBNER and ALICE SCRIBNER,
Defendants.

SUPERSEDEAS BOND (ALICE SCRIBNER).

KNOW ALL MEN BY THESE PRESENTS: That we, Alice Scribner, of Seattle, King County, Washington, and The National Surety Company of

New York, as surety, are held and firmly bound unto the United States of America, plaintiff in the above-entitled action, in the penal sum of Two Thousand Dollars ($2,000.00), lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

The condition of this obligation is such, that whereas the above-named defendant, Alice Scribner, was on the 4th day of February, 1924, sentenced in the above-entitled cause as follows: on Counts I and II of the information, constituting a simple offense, to pay a fine of Five Hundred Dollars ($500.00); on Count III of the information to be imprisoned for six months in the King County jail of the State of Washington.

And, whereas, the said defendant has sued out a writ of error from the sentence and judgment in said cause to the Circuit Court of Appeals of the United States for the Ninth Circuit.

And, whereas, the above-entitled court has fixed the defendant's bond, to stay execution of the judgment in said cause, in the sum of Two Thousand Dollars ($2000.00).

NOW, THEREFORE, if the said defendant, Alice Scribner, shall diligently prosecute *his* said writ of error to effect, and shall obey and abide by and render herself amenable to all orders which said Appellate Court shall make, or order to be made, in the premises, and shall render herself amenable to and obey all process issued, or ordered

[31] to be issued, by said Appellate Court herein, and shall perform any judgment made or entered herein by said Appellate Court, including the payment of any judgment on appeal, and shall not leave the jurisdiction of this court without leave being first had, and shall obey and abide by and render *himself* amenable to any and all orders made or entered by the District Court of the United States for the Western District of Washington, Northern Division, and will render *himself* amenable to and obey any and all orders issued herein by said District Court, and shall pursuant to any order issued by said District Court surrender and obey and perform any judgment entered herein by the said Circuit Court of Appeals or the said District Court, then this obligation to be void; otherwise to remain in full force and effect.

Sealed with our seals and dated this 5th day of February, 1924.

ALICE SCRIBNER,
Principal.
NATIONAL SURETY COMPANY.
By RALPH S. STACEY,
Resident Vice-President.
[Corporate Seal] Attest: J. GRANT,
Resident Assistant Secretary.
O. K.—C. T. McKINNEY.

I hereby approve of the foregoing bond, this 5th day of February, 1924.

NETERER,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. February 5, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [32]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7795.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOTTIE POWELL,

Defendant.

SUPERSEDEAS BOND (LOTTIE POWELL).

KNOW ALL MEN BY THESE PRESENTS: That we, Lottie Powell, of Seattle, King County, Washington, as principal, and National Surety Company, of New York, as surety, are held and firmly bound unto the United States of America, plaintiff in the above-entitled action, in the penal sum of Fifteen Hundred ($1500.00) Dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH, that whereas the above-named defendant, Lottie Powell, was on the 4th day of February,

1924, sentenced in the above-entitled cause as follows: On Count III of the information to be imprisoned for six months in the King County jail of the State of Washington.

AND, WHEREAS, the said defendant has sued out a writ of error from the sentence and judgment in said cause in the sum of Fifteen Hundred ($1500.00) Dollars.

NOW, THEREFORE, if the said defendant, Lottie Powell, shall diligently prosecute her said writ of error to effect, and shall obey and abide by and render herself amenable to all orders which said Appellate Court shall make, or order to be made, in the premises, and shall render herself amenable to and obey all process issued, or ordered to be issued by said Appellate Court herein, and shall perform any judgment made or entered herein by said Appellate Court, including the payment of any judgment on appeal, and shall not leave the judisdiction of this court without leave first had, and shall obey and abide by and render herself amenable to any and all orders made or entered by the District Court of the United States for the Western District of Washington, Northern Division, and will render herself amenable to and obey any and all orders issued herein by said District Court, and shall pursuant to any order issued by said District Court surrender and obey and perform any judgment entered herein by the said Circuit Court of Appeals or the said District Court, then this obligation to be void; otherwise to remain in full force and effect.

Sealed with our seals and dated this 9th day of February, 1924.

LOTTIE POWELL,
Principal.

NATIONAL SURETY COMPANY.
By W. W. CONNER,
Resident Vice-President.

[Corporate Seal] Attest: J. GRANT,
Resident Assistant Secretary.

O. K.—THOS. P. REVELLE,
U. S. Attorney.

Approved:

NETERER,
Judge.

I hereby approve of the foregoing bond, this 11th day of February, 1924.

_____,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. February 11, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [33]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7795.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM L. SCRIBNER and ALICE SCRIBNER,

Defendants.

SUPERSEDEAS BOND (WILLIAM L. SCRIBNER).

KNOW ALL MEN BY THESE PRESENTS: That we, William L. Scribner, of Seattle, King County, Washington, and The National Surety Company of New York, as surety, are held and firmly bound unto the United States of America, plaintiff in the above-entitled action, in the penal sum of Twenty-two Hundred and Fifty Dollars ($2250.00), lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

The condition of this obligation is such, that whereas the above-named defendant, William L. Scribner, was on the 4th day of February, 1924, sentenced in the above-entitled cause as follows: On Counts I and II of the information, constituting a single offense, to pay a fine of Seven Hundred

and Fifty Dollars ($750.00); on Count III of the information to be imprisoned for six months in the King County jail of the State of Washington.

And, whereas, the said defendant has sued out a writ of error from the sentence and judgment in said cause to the Circuit Court of Appeals of the United States for the Ninth Circuit.

And, whereas, the above-entitled court has fixed the defendant's bond, to stay execution of the judgment in said cause, in the sum of Twenty-two Hundred and Fifty Dollars ($2250.00).

NOW, THEREFORE, if the said defendant, William L. Scribner, shall diligently prosecute his said writ of error to effect, and shall obey and abide by and render himself amenable to all orders which said Appellate Court shall make, or order to be made, in the premises, and shall render himself amenable to and obey all process issued, or ordered [34] to be issued, by said Appellate Court herein, and shall perform any judgment made or entered herein by said Appellate Court, including the payment of any judgment on appeal, and shall not leave the jurisdiction of this Court without leave being first had, and shall obey and abide by and render himself amenable to any and all orders made or entered by the District Court of the United States for the Western District of Washington, Northern Division, and will render himself amenable to and obey any and all orders issued herein by said District Court, and shall pursuant to any order issued by said District Court surrender and obey and perform any judgment entered herein

by the said Circuit Court of Appeals or the said District Court, then this obligation to be void; otherwise to remain in full force and effect.

Sealed with our seals and dated this 5th day of February, 1924.

WILLIAM L. SCRIBNER,
Principal.

NATIONAL SURETY COMPANY,
By RALPH S. STACEY,

[Corporate Seal] Attest: J. GRANT,
Resident Vice-President.

O. K.—C. T. McKINNEY.

I hereby approve of the foregoing bond, this 5th day of February, 1924.

NETERER,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. February 5, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [35]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7795.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WILLIAM L. SCRIBNER, ALICE SCRIBNER and LOTTIE POWELL,
Defendants.

ORDER TO CONSOLIDATE.

This matter coming regularly on for hearing on the oral motion of Adam Beeler, attorney for the defendants herein; it appearing to the Court that a writ of error and a citation thereon has been issued in the case of United States of America vs. William L. Scribner and Alice Scribner, and that the same also has been issued in the case entitled United States of America vs. Lottie Powell; it further appearing to the Court that the defendants, William L. Scribner, Alice Scribner and Lottie Powell, were tried jointly in this Court and that the writ of error herein should be prosecuted jointly, and the Court being fully advised in the premises, good cause being shown,—

IT IS HEREBY ORDERED that the writ of error of William L. Scribner and Alice Scribner, in cause number 7795, be consolidated with the writ of error in the case of United States of America vs. Lottie Powell, in cause number 7795.

Done in open court this 11th day of February, 1924.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, February 11, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

Received a copy of order to consolidate this 11th day of February, 1924.

THOS. P. REVELLE,
Attorney for Plaintiff. [36]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7795.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WILLIAM L. SCRIBNER, ALICE SCRIBNER and LOTTIE POWELL,
Defendants.

ORDER EXTENDING TIME TO AND INCLUDING FEBRUARY 20, 1924, TO FILE BILL OF EXCEPTIONS.

For good cause now shown,

IT IS ORDERED that the time within which the defendants shall serve and file their proposed bill of exceptions in the above-entitled cause be, and the same hereby is, extended to and including the 20th day of February, 1924.

Dated this 11th day of February, 1924.

JEREMIAH NETERER,
Judge.

Received a copy of order this 11th day of February, 1924.

THOS. P. REVELLE,
Attorney for Plaintiff,

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. February 11, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [37]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7795.

WILLIAM L. SCRIBNER, ALICE SCRIBNER and LOTTIE POWELL,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 20th day of December, 1923, at the hour of 10 o'clock A. M., the above-entitled cause came on regularly for trial in the above-entitled court, before the Hon. Jeremiah Neterer, Judge thereof; the defendant appearing by C. J. McKinney, Assistant United States Attorney for said district, and the plaintiffs being present in person and appearing by their attorney, Adam Beeler.

The jury having been regularly and duly impanelled and sworn to try the case, the Assistant United States Attorney thereupon made to the jury the statement of the defendant's case and the following evidence was thereupon offered:

TESTIMONY OF J. A. SIMMONS, FOR THE GOVERNMENT.

J. A. SIMMONS, a witness produced on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

My name is J. A. Simmons and I am a Federal Prohibition Agent. On July 5th I had occasion to visit the Star Rooms in the city of Seattle, located at 201½ 2d Avenue, South.

Thereupon Mr. Beeler requested of the Court permission to question the witness with relation to the legality of the arrests, and the request was by the court denied, and to which ruling an exception was duly noted.

The witness continued: A lady called Lottie let me into the premises, I did not know her last name at that time. It is the lady sitting back there (indicating the defendant, Lottie Powell), her name is [38] Lottie Powell. After she permitted me to enter she showed us into the sitting-room just to the right as you go up to the top of the stairs, into this serving room rather, and we asked to be served liquor. She served us with drinks that afternoon. Three drinks of bonded

(Testimony of J. A. Simmons.)

liquor. We paid her fifty cents a drink for this. We purchased it from this girl called Lottie Powell, the one who had admitted us, and did not see Vera Harper that afternoon. Lottie Powell was the only one who was in the building on July 5th at one time. I returned to this place again on the night of July 5th, about 9 P. M., and I was accompanied by Assistant Director Whitney. We were admitted by the larger girl called Vera Harper. After she allowed us to enter we came upstairs in the hall and talked to her and she did not know us but Lottie came out to the sitting-room and said we were O. K., and showed us into the front parlor that faces on Washington Street. They both conducted us into this front room. We ordered drinks that night and we were served with drinks in this front room. Vera Harper served them but Lottie Powell went out and got the serving bottle and glasses or glass. There was only one serving glass. Lottie Powell left the room and got a bottle of whiskey and the serving glass and brought it back and then she requested Vera Harper to do the serving. Vera Harper served Mr. Whitney and me with drinks of bonded liquor. I paid for some of them. The first drinks that I bought I paid fifty cents a drink. I gave Vera Harper a five dollar federal reserve note. Both of the girls, Lottie Powell and Vera Harper, participated in the drinking that night and we paid for those drinks also. There was only one glass. The liquor was in an eight-ounce bottle. While we were

(Testimony of J. A. Simmons.)

there on July 5th at 9 P. M., the girls ordered some whisky. They had stated that they were running short and Vera Harper went to the telephone, which is in the same room, and called a taxicab company. She asked the party that she was talking to to bring up a quart bottle of Hall & Hall. We remained there until the whiskey arrived. They brought the whisky in in the quart bottle that they had been serving from. Lottie Powell went out and came back with it filled up again. After that Mr. Whitney ordered some more. Mr. Whitney ordered a round of drinks and they were served by Lottie Powell at that time. On the afternoon of July 6th, I had occasion to visit this [39] place again about 5:30 P. M. Mr. Whitney and I both went to the Star Rooms, Lottie Powell admitted us. We were then shown into the same front room, this parlor that faces on Washington Street, and we ordered four drinks for the four of us, and I paid for the first four, two dollars ($2.00), with marked money, that is, fifty cents per drink. Vera Harper served these drinks this day. The whisky was not in the room. Lottie Powell brought it in and Vera Harper served it. They had one serving glass. There were four people, Lottie Powell, Vera Harper, Mr. Whitney and myself that participated in the drinking. Before the last round of drinks Mrs. Scribner came in and she was invited to participate in the drinking by one of the girls but she stated no, that she was not feeling well and had not been for several

(Testimony of J. A. Simmons.)

days and it was her first day downstairs. She left the room at that time and four more drinks were served. The young women, the girls in this case, addressed Mrs. Scribner that night as mamma. They stated that she was the landlady and she was asked to have a drink and she said no, that she had not been feeling well but that the girls would look after us. She was the proprietor of the place. I was present at the time that the girls were arrested. At the time Mrs. Scribner said that the girls were not the ones who were running the place, that the liquor was hers that had been sold and that they were working for her and should not be taken and locked up. She said that they were working for her and under her orders. She said that they were inmates of the place. That bottle (referring to Government's Exhibit Number One for Identification) contains the drink that was served to me just before the arrest which I saved and poured into this bottle on the night of July the 6th. This (referring to Government's Exhibit Number Two for Identification) is the glass in which the liquor was served on the night of July the 6th, at the time the defendants were arrested. That (referring to Government's Exhibit Number Three for Identification) is the bottle of liquor from which the drinks were served on the night of July the 6th, all of the other whisky that was served there was consumed. I participated in the searching of the premises and I searched the desk and that night [40] the small

(Testimony of J. A. Simmons.)

writing desk was locked and in order to get it open we had started to pry it and Mrs. Scribner said: "Don't do that; I have a key for it." We were in search of the marked money which we had given on July the 5th and also on the night of July 6th. I opened the desk and I found marked money. Mrs. Scribner opened the desk with the key she had. I also found marked money in the chiffonier that was in this room that the desk was in. In the room upstairs occupied by Vera Harper in a dresser drawer we found a marked dollar federal reserve note and silver. The federal reserve note was money I gave her on the night of July the 5th. I was not right in the room at the time Mr. Scribner was placed under arrest but immediately afterwards I was. Mr. Scribner stated in regard to his relation to these premises that he was the husband of Mrs. Scribner and that he lived there and did not pay any room and board and that he was the manager of the Bungalow. He did not state that he had any financial interest in this place and he did not deny that he had any interest in it. He heard Mrs. Scribner admit that she was the proprietress of this place.

Cross-examination.

My name is Simmons and I am a Federal Prohibition Agent in the employ of the United States Government. I have been a Federal Prohibition Agent since June 1922. I have never been deputized as a United States Marshal, nor Deputy Sheriff, nor

(Testimony of J. A. Simmons.)

Constable nor any police officer other than a Federal Prohibition Agent. That is the only capacity that I was acting in and under which I was operating that night. I just entered the Star Hotel at one P. M. on July 5th. I went there with a man they call Mack, the man that got me into that place. I knew him by Mack but I believe his name was McCrury or something like that. I had not known him very long prior to the time of the arrest. I could not state positively or exactly, it might have been three or four days. I got up there at 1:30 in the afternoon and Mack and I remained there about fifteen minutes and Lottie Powell was the only girl we saw. I purchased three drinks of bonded liquor from her and the liquor was consumed by Mack and Lottie Powell and myself. We did not have three drinks apiece, only one [41] drink apiece. Then I left and went out of the place. I did not do anything else on the premises, on that occasion there. I went back the next time about 9 P. M. that evening and Mr. Whitney went along. Mr. Whitney and I went up ourselves, nobody else accompanied us. We arrived there about 9 o'clock and saw Vera Harper in the hall. Lottie Powell came out of the door on the side of the hall and told Vera Harper we were O. K. They were all we saw that night. I purchased three rounds of four drinks a round and Mr. Whitney bought one round of four drinks. I paid for the first round of drinks with a marked five-dollar federal reserve note. That was on the evening of

(Testimony of J. A. Simmons.)

July the 5th. I paid that money to Vera Harper. I did not give any money to Lottie Powell, Mr. Whitney gave money to Lottie Powell. He gave her two dollars on that night of July 5th. I spent six dollars and Mr. Whitney two dollars, all told eight dollars, a five-dollar bill and a silver dollar of my own, both of which were marked money and Mr. Whitney gave two dollars that were marked. It is not the truth that all the money that was taken by us on that night was given to Vera Harper, and it is not a fact that Lottie Powell was not on the premises that night. I did not see Mr. or Mrs. Scribner there that night. The Star Hotel consists of two different stories above the street. The first entrance you come up is a stairway facing east and west and you turn to the right and go up a short landing before you get up into the main part of these Star Rooms. Then there is a stairway leading up to the right about five feet from the entrance of the stairway from the street that leads upstairs to the third floor. The third floor was the living quarters of Mr. and Mrs. Scribner. On July the 5th I never went on the third floor at all. On my first visit at 1 P. M. and at 9 P. M. I did not see either Mr. or Mrs. Scribner down on the second floor on either of these occasions. On the second visit at 9 o'clock in the evening when Mr. Whitney and I were buying these drinks from these girls in the room that faces on Washington Street and Second Ave. South, there is no number to the

(Testimony of J. A. Simmons.)

room and I do not recall that it had a letter. This was a sort of a parlor, you might call it a living-room, some people might call it that and some people might call it a parlor, it was a serving room, that is what it was. After we bought these drinks [42] on July the 5th Mr. Whitney and I left and we went back again about 5:30 P. M. on the 6th day of July when we went there we stayed long enough to make the two purchases of liquor, which took us about a half hour, before the arrest was made. We made two purchases of liquor. I purchased the first round. Vera Harper and Lottie Powell were both present at that time. At that time Mrs. Scribner was in the room off from the parlor. Neither Mr. or Mrs. Scribner were present in the room. Mr. and Mrs. Scribner did not participate in any of the transactions or any of the conversation and Mr. Scribner did not in any way enter the transaction or conversation on the 6th day of July, the night that we were there about 5 o'clock. He was upstairs. He was not in the room on the second floor. Mrs. Scribner came in there between the serving of the round that I purchased and just before Mr. Whitney purchased the round that he purchased. I paid for the first round and Mr. Whitney paid for the second round. We bought those drinks from Vera Harper. The last drink was purchased from Lottie Powell. Lottie Powell sold some liquor to myself and Mr. Whitney on the 6th day of July at 5:30 o'clock. Mr. Whitney paid for that liquor. I did

(Testimony of J. A. Simmons.)

not myself directly have any dealings with Lottie Powell, other than that she brought in the liquor. When Mr. Whitney and I entered the room on the 6th day of July we first saw Lottie Powell. She met us in the hallway. That is, the young lady sitting on the end is Lottie Powell (referring to the defendant, Lottie Powell) and the lady next to her is Vera Harper. Lottie Powell was in the room when I came in and it is not a fact that she was not in the room at all at that time of July the 6th, and that she came in afterwards. It is not a fact that I and Mr. Whitney were there about twenty minutes, or some matter of that length of time, before she came into the room. That is the truth. It is not a fact that we had had one drink before she came into the place. On the night of the 6th day of July I stayed there quite a long time after the arrest was made. I stayed there from 5 o'clock in the afternoon until 11 o'clock at night. During the period of six hours I had the prisoners in charge. By prisoners, I mean Lottie Powell and Vera Harper, and also Mr. and Mrs. Scribner. We arrested Lottie Powell and Vera Harper [43] and Mrs. Scribner first. Mrs. Scribner was in the room adjoining where we were. Up to that time we had had a conversation with Mrs. Scribner. She had come into the room of her own accord. Vera Harper invited Mrs. Scribner to have a drink. She said she was not feeling very well and had not been for a few days. Mrs. Scribner started the conversation herself. She ex-

(Testimony of J. A. Simmons.)

plained to us that she was the proprietress of the place and that the girls would look after us. That is what she said. I did not ask her the question. She volunteered the statement after she had refused to drink. She did not say she was the landlady, she said she was the proprietress; the girls will look after your needs. I was not attracted to the people on the third floor where Mr. and Mrs. Scribner lived by some woman calling out, "Dinner is ready." I cannot speak for anyone else. I do not know whether I learned of the people on the third floor calling down the stairway that dinner was ready. I stated that I was not present when Mr. Scribner was placed under arrest. Mr. Whitney did that but I was there shortly afterwards. I had left the hotel. I want to change my testimony now, I went over to get some change for Mr. Whitney, who was going to use some money for some other purpose. I do not know what Mr. Whitney was going to do with it but he wanted some change. He gave me a twenty-dollar bill. Yes, I know where Mr. Whitney got the twenty-dollar bill from. He got it from one of the girls. I do not recall whether it was Vera Harper or Lottie Powell. I could not say whether it was from Vera Harper's or Lottie Powell's purse. I could not say positively as to that. I took the twenty-dollar bill and went down the street to a store and got it changed. There were no other women accompanying me and Mr. Scribner on the night of July the 6th, when we

(Testimony of J. A. Simmons.)

placed these women under arrest, Lottie Powell, Vera Harper and Mrs. Scribner were there up to the time of the arrest. Mrs. Mooring and Mrs. Whitney came up there. I could not say what time they came positively. It was around 6:30 or 7 o'clock. I never at any time, either on July the 6th or July the 5th, bought any drinks from the defendant, William Scribner, and I never at any time found any liquor on Mr. Scribner's person. Mr. Whitney and I found liquor in the room occupied by Mr. Scribner. We found it on the washstand in his room. It was in a bottle. I can identify this (referring [44] to bottle) as the liquor we got from the room of Mr. Scribner. My initials are on the bottle as identification marks. They were put on immediately after this was found. This (referring to article marked Exhibit No. 3 for Identification) is the bottle from which the drinks were poured that were served to us. (Referring to bottle marked Plaintiff's Exhibit Number One for Identification) is the drink that was served to me that I saved. This bottle (number four) we found on Mr. Scribner's washstand in his room. The same liquor was in it at the time we found it, I reckon, I do not know. The same amount. (Referring to Government's Exhibit Number 3.) That was the liquor that was taken from Lottie Powell and Vera Harper from which the drinks were served on the 6th of July. Mr. Whitney took it from the hands of Vera Harper. It is in the same condition now

(Testimony of J. A. Simmons.)

as at the time Mr. Whitney took it from Vera Harper. It had a cork in it like this. It is very similar, but I could not say as to whether it is the same in every respect. It is not a fact that neither of these bottles were found by me in the Star Hotel. This liquor in this small bottle (Government's Exhibit Number 1) that was the drink that I saved and poured from the whisky glass into this bottle, which I took with me to the office in order to preserve the evidence. I got that on the night of the 6th of July at the time of the arrest. That was the last drink served to me. Mr. Whitney purchased it from Lottie Powell. That (referring to article marked Exhibit Number 2 for Identification) was the glass that I had the drink in which was poured into that small bottle on the 6th of July. On the 5th of July I had five drinks. They were in this glass here but the glass was not full. I could feel the effect of the five drinks. Mr. Whitney had as many drinks as I had. I could not say whether he could feel the effect of his drinks. When we arrested Vera Harper there was no fight or altercation between Mr. Whitney and Vera Harper at all. When I went on the third story to where Mr. and Mrs. Scribner lived Mr. Whitney did not go with me. He had gone before me. Mr. Whitney went up there just before, just shortly after the arrest was made I had the three women in the front room. I was in the front room and Mr. Whitney went [45] *went* upstairs. He did not stay upstairs

(Testimony of J. A. Simmons.)

a great while. I could not say positively just how long he stayed up there. Other agents had been called in the meantime you understand. Mr. Whitney did not remain upstairs an hour. He remained upstairs possibly about a half hour. While Mr. Whitney was upstairs a half an hour I did not remain downstairs with the three defendants. I went up there a short time afterwards. Mr. Whitney was up there alone just a few minutes before I went up. I did not say for ten minutes. About a period of five minutes. I went up voluntary. At the time I went up there were other prohibition agents there besides Mr. Whitney. There were three or four others that had come in. None of the other prohibition agents had come upstairs and in the apartment occupied by Mr. Scribner and his wife prior to the time that we found the liquor. Mr. Whitney and I searched Mr. Scribner's room. We found the bottle on the washstand, a serving glass or a wine glass, and search through their apartment there. It possibly took us fifteen or twenty minutes. After three women were arrested, about a half hour possibly elapsed before anybody went upstairs to Mr. Scribner's apartment. I do not know whether Mr. Scribner was alone at least half an hour while I and Mr. Whitney were downstairs with the three women who were just placed under arrest, he was upstairs. This bottle of liquor was right out in the open on the washstand where you might see it. We originally placed another woman under arrest. She

(Testimony of J. A. Simmons.)

was the cook there. She was occupying this one room with all the people who occupied this building. I could not say just when she was brought down. It must have been between the time Mr. Whitney went upstairs and when I went upstairs, or it might have been after, I won't say but it was not before we went up. We found some money in the little desk. Two silver dollars. We found some money in the chiffonier, there were three or four silver dollars in the drawer. That money is held as evidence. We got just the marked money that we paid in the chiffonier. The chiffonier was in a room that was between the room Mrs. Scribner was in and the living-room. It was not the sleeping quarters. It was between these premises. It was not the room that was occupied by Vera Harper. That (referring to article marked Exhibit 6 for Identification) is the same five-dollar bill that was in Vera Harper's dresser drawer. It was loose [46] in the drawer, it was not in her purse. We got it out of the dresser in the room she said she occupied. All of the marked money that we found in addition to the five-dollar bill was not found in the purse in the room occupied by Vera Harper. I gave this five-dollar bill on the 5th of July, to Vera Harper. I found it the next day in the dresser drawer of Vera Harper. No marked money was found in the premises occupied by Mr. and Mrs. Scribner. We made a thorough search of the premises occupied by Mr. and Mrs. Scribner, lasting at least half an hour. The apartment con-

(Testimony of J. A. Simmons.)

sists of two bedrooms up there and a dining-room and a kitchenette on the third floor. I did not go through everything myself to see what could be found. All the dressers and cupboards of the place were gone through by myself and Mr. Whitney or possibly some of the other agents, and I found absolutely nothing at all. I found liquor on the washstand, and excepting this liquor on the washstand, I found no liquor concealed. I did not find any device for caching liquor where it might be concealed or hidden away. I helped to take these people down to the immigration station. I did not have any conversation with Mr. Scribner at the immigration station. We may have had a conversation with him on the way going to the immigration station. It is not true that either I or Mr. Whitney said to Mr. Scribner, "We will turn you loose to-morrow morning; we have nothing on you." Nor did we say, "You won't have to put up any bond before the Commissioner because we have nothing on you." Mr. Whitney did not in my presence make such a statement. I don't know where that witness, Mack, the fellow who went with me the first time is, or what his address is.

Redirect Examination.

That (referring to Government's Exhibit Number 7 for Identification) is three of the marked silver dollars that we used on July the 5th in purchasing the liquor at the Star Rooms. I identify those dollars by the scratch on the left leg of the eagle. Those (referring to Government's Ex-

(Testimony of J. A. Simmons.)

hibit Number 1 for Identification) are two marked silver dollars used for the purchase of liquor on July the 6th. Those were the drinks that were purchased by me. That (referring to Government's Exhibit Number 6 for Identification) is the federal reserve note used for the purchase of liquor on July the 5th from Vera Harper. That (referring to Government's [47] Exhibit Number 5 for Identification) is the wine glass that was sitting alongside of the bottle of whisky found on the washstand in Mr. Scribner's room on the third floor in the Star Rooms. That (referring to Government's Exhibit Number 1 for Identification) is a bottle found on the washstand in Mr. Scribner's room. The money that I referred to on cross-examination was taken from the chiffonier. Vera Harper stated that the chiffonier was hers.

Recross-examination.

These notations on these envelopes were made immediately. The same time we labeled the evidence on the liquor I wrote all the information that I thought necessary on the envelopes that contained the money I believe that I placed the names of the parties from whom I got the money on the envelopes as I put the money in the envelopes. That (referring to Government's Exhibit Number 9 for Identification) was not taken by me from Vera Harper. The marked five-dollar bill (Exhibit 1) or treasury note was in Vera Harper's dresser drawer. The rest was found in the chiffonier or the writing desk downstairs. I

(Testimony of J. A. Simmons.)

think the five-dollar bill found in the dresser drawer of Vera Harper was Vera Harper's because at that time I thought it was hers. I did not write that Mr. Whitney wrote that. (Referring to writing on envelope.) All of the money that we got and that has been offered in evidence was not taken from Vera Harper or from her place in that room where she was living.

TESTIMONY OF W. M. WHITNEY, FOR THE GOVERNMENT.

W. M. WHITNEY, a witness produced on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

I am a Federal Prohibition Agent and have been in that service a little over two years. During the month of July I had occasion to visit 201½ 2d Avenue, South, known as the Star Rooms. At about nine o'clock on July the 5th, I accompanied Agent Simmons to the Star Rooms. Vera Harper permitted us to enter those rooms. After we got inside she stopped to talk to us in the hallway, and just as we started the conversation Lottie Powell [48] came out of one of the serving rooms along this long hallway and said, "Oh, they are all right." Then they took us down to the room furthest north, which is in the northeast corner. We entered this room, the bell rings if you go up and if you open the door it rings a bell and some of these women come out and meet you. There

(Testimony of W. M. Whitney.)

are four serving rooms along there. Right alongside of this hallway.

Thereupon the witness was asked whether or not those rooms were furnished, to which question Mr. Beeler objected and which objection was by the Court overruled. Mr. Beeler thereupon moved the court that the testimony of the witness to the effect that these were four serving rooms be stricken, which motion was denied and to which ruling an exception was taken.

The witness continued: There is no bedrooom.

The Court thereupon made the following statement: "I will say in this connection that the jury will not be bound by his conclusions as to what the rooms were. He is simply defining the rooms. Let the jury conclude what they are used for.

The witness continued: There is a little stand or small table in each room and there are two or three or four chairs in each room, and a little settee, as I call it, in each of those four rooms, or a sofa. The room to the north of the hallway, the door into that room looks directly down the hallway. It is sort of L-shaped, that is, it sets across the hallway and joins the other room along the east side. We were shown into this furthest room, the one that sets across the end of the hall and also joins the room that is to the right of the hall. We asked for whiskey when we went into that room and we got some. Mr. Simmons purchased three rounds of four drinks

(Testimony of W. M. Whitney.)

and I purchased one round of four drinks. A serving bottle and serving glass were brought into the room by Lottie Powell. She went out of the room in which we were into the room to the south, and she left the door open. I was sitting in a chair looking right down the line of doors, and she went through that room to the next serving room and shut that door and I could not see where she went then. When she came back she brought an eight-ounce serving bottle partly filled with whiskey [49] and a small serving glass. We were served from that bottle. We paid for those drinks, fifty cents per drink. Mr. Simmons gave Vera Harper a five-dollar bill and one silver dollar. I bought two drinks that night. They were served and poured by Vera Harper. The bottle was brought in by Lottie Powell. I paid two dollars for those drinks. There was not very much in the bottle after we had bought a round or two and about the time the last drink was poured out the defendant, Vera Harper, went to the telephone in the room in which we were served and called up a number, which I know to be a certain taxicab company here, and asked them to send down another bottle, giving them the name of Alice. She said "This is Alice." In the course of ten or fifteen minutes the bottle was brought down, or at least the girl said so, and Lottie Powell went out and got the bottle and refilled it again and brought it back, and it was out of the refilled serving bottle

(Testimony of W. M. Whitney.)

that I bought the last round of drinks which were served by Vera Harper, and Vera Harper was paid the money. After we were served with this last round of drinks we left. I again visited these premises on the following evening at about 5:30. Mr. Simmons was with me. My memory is that Lottie Powell let us in the hallway. Anybody just walks in and the bell rings as you open the door. We bought drinks that night. We went right back to the same serving room and the two girls were there. Mr. Simmons bought the first round of drinks and I bought the last round of drinks. Lottie Powell brought the whisky and serving glass in that night. I made an error when I said a minute ago that Vera Harper served the last drink the night before. Lottie Powell served us after she brought the serving bottle in and after it was refilled. These women participated in the drinking. We paid for their drinks along with our drinks at fifty cents per drink. The last round of drinks I paid for that night on the 6th. The first drink was given to me and I drank it, and I then took two silver dollars out and attempted to give them to Vera Harper, and she said, "I am too busy now; just lay them down there." And Mr. Simmons was then served the drink he saved. After Mr. Simmons had been served his drink I put them under arrest and I told them that we were federal officers and that they were under arrest. I arrested at the first moment both Lottie Powell and Vera Harper,

(Testimony of W. M. Whitney.)

and then I [50] stepped into the adjoining room in which Mrs. Scribner was in. She had not been in that room before that night, but she had been in there just a few moments before that. Mrs. Scribner had been in that particular room where we were drinking before on this same night. One of the girls said, "This is our mamma." And she came over and sat down and engaged in the conversation. She was invited to have a drink both by Vera Harper and by myself. We talked there for a few minutes, probably, on general things, and I said, "We missed you last night." She said, "Well, I was sick last night." I said, "Won't you have a drink with us now?" She said, "Oh, no, I am not feeling very well. The girls will take care of you." I said, "You are the landlady here?" That is one of the things I was there for to find out, and that is one of the reasons why we did not arrest them the night before because I did not see her there then. I asked her if she was the landlady and she stated that she was. She left after she had declined to drink and after she said the girls would take care of us, she went back into the other room and sat at this table. There is a little table in that room and she was reading a paper at that table. That is the place where I arrested her. That is the place where she had her writing desk, and a sort of chiffonier. After I arrested her I brought all three of the women into this room we were served, and when she came in I immediately phoned for the other

(Testimony of W. M. Whitney.)

agents to come down. After I arrested Mrs. Scribner a short time after the other agents arrived I turned them all over to Mr. Simmons. Mrs. Scribner said, "You are not going to take the girls down, are you?" I said, "Yes." She said, "They only work for me here. I am the landlady. I am responsible for anything that goes on here, and they are simply serving and working for me. They do not have anything to do with it." I know the nature of the work they were doing for her. Mrs. Scribner stated what kind of work they were doing. The prisoners, Mrs. Scribner, Lottie Powell and Vera Harper were arrested on the second floor. I searched the third floor but before I did that we took the prisoners back into the first serving room at the head of the stairs, that is the furthest room to the south on the same side of the building, and put them in that room with Mr. Simmons; and then when the other agents came down, which was [51] probably about five minutes afterwards, as they only had to come about three blocks, I then went upstairs on the third floor. On the third floor I found a dining-room and a kitchen and the table all set for dinner, and the cook and Mr. Scribner. He was in the living-room of himself and Mrs. Scribner, in the bedroom. I do not remember what he was doing, he was standing up in there. I placed him under arrest. I told both him and the cook to come downstairs. I brought them both downstairs and put them in the same room with Mrs. Scribner and the girls

(Testimony of W. M. Whitney.)

with Mr. Simmons. Then I put another agent in charge and took Mr. Simmons and Mr. Justi, and we went up on the third floor immediately. I saw Mr. Justi find a bottle of beer in the ice-box in the kitchen. Mr. Simmons and I walked right straight into the room occupied by Mr. and Mrs. Scribner, and on the washstand was standing an eight-ounce bottle of whisky and a serving glass. I do not recall that at any time while I was downstairs did I hear anyone call or ring or say it was dinner time. I heard someone moving about upstairs. It is a rather difficult matter for anybody who does not know these places— I had not seen this stair leading to the third floor when I first walked out quickly on the second floor to the other room. The second floor, as well as the third floor, belonged to two separate buildings; in other words, Mrs. Scribner rents from two landlords, or there are two buildings. There is a sort of an archway cut out. I had gone over to the western part of the second floor rooms and gone quickly down through to see if there was any liquor inside; then when I came back around near the head of the stairs that go up from the second floor I heard someone moving around upstairs, but I do not recall anybody saying, "Dinner is ready." That was the first time that I had noticed this stairway that I had missed before, and then I went up on the third floor. At the time I arrested Mr. Scribner he did not at first make any statement to me. Afterwards he stated that he

(Testimony of W. M. Whitney.)

lived there and that he and Mrs. Scribner were husband and wife. He said that he was manager of the Bungalow Dance Hall and worked up there; and he asked me either to let him go up there or call somebody to come down and get the money that was to be used that night up there. He stated that Mrs. Scribner was the [52] proprietress of this place and that he did not have anything to do with it. He said she was running the place. After we got through searching the third floor Mr. Simmons and I searched for the marked money, which we found. I found a five-dollar bill in the dresser drawer of the room occupied by Vera Harper, which room was, as I recall it, on the second floor to the right of the hall. These service rooms are all on the east side of the hall. I found in a box, with a number of other trinkets where she kept the money, several silver dollars and this five-dollar bill and two or three other bills. Then we went to the room in which Mrs. Scribner was sitting when I arrested her and where I had seen Vera Harper take the two dollars after we had bought the first round of drinks and apparently put them in the chiffonier drawer. We also in there found four of the marked silver dollars, two of which had been used on the previous day and two of which were used on July the 6th. Mrs. Scribner had come in that room, or had been brought in, as I was going to force the desk when she said that she had a key and it was her desk, and she produced a key that she had and unlocked the desk. She unlocked the desk herself and I searched the desk. In a little

(Testimony of W. M. Whitney.)

box in the desk was one of these silver dollars among quite a number of silver dollars—one of the silver dollars that we used on July the 5th. The marked money in the chiffonier was found in two different drawers. There were a lot of silver dollars and silver half dollars in these two drawers of the chiffonier. After Mrs. Scribner was arrested she stated that she was the proprietress of the place, and she said that the girls were working for her and wanted us not to take them. That (referring to Government's Exhibit Number 1 for Identification) is the last drink that was served to Mr. Simmons. That (referring to Government's Exhibit Number 2 for Identification) is the serving glass that we were served from the last night. That (referring to Government's Exhibit Number 5 for Identification) is the glass that I found in the premises of Mr. Scribner on the washstand beside the bottle of whisky kept by Mr. and Mrs. Scribner. That (referring to Government's Exhibit Number 4 for Identification) is the bottle of whisky which we found on the washstand in Mr. Scribner's room on the third floor. That (referring to Government's [53] Exhibit Number 6 for Identification) is the five-dollar silver certificate that was used by Mr. Simmons on the night of July the 5th. It was found in Vera Harper's dresser drawer. That (referring to Government's Exhibit Number 7 for Identification) is the three dollars which was used by Mr. Simmons and another was used by myself and another was used in the purchase on July

(Testimony of W. M. Whitney.)

the 5th. I identify that money by the dates which I had down, and a scratch on the left leg of the eagle. These (referring to Government's Exhibit Number 9 for Identification) are the two silver dollars that Mr. Simmons paid for the first round of drinks on the night of the 6th. Those (referring to Government's Exhibit Number 8 for Identification) are the two silver dollars that I marked with the scratch across the left leg of the eagle and used to buy the last round of drinks. We found these on the washstand where I laid them—not on the washstand, but on the small table or stand. That (referring to Government's Exhibit Number 10 for Identification) is the bottle of beer that was found in the ice-box by Mr. Justi, one of my men, in the kitchen on the third floor on the premises of Mr. and Mrs. Scribner.

Cross-examination.

I am a prohibition agent and was such in the month of July of this year. I was acting in such capacity at the time of this arrest. I was not acting in the capacity of a marshal or deputy sheriff. I have been deputized as an arresting officer of that character. I do not know whether my commission has ever been sent in or not. I had a commission as deputy sheriff. The first time I went to this hotel was on July the 5th, 1923. I got down there about nine o'clock. Mr. Simmons accompanied me. It was on July the 5th that Mr. Simmons gave Vera Harper this five-dollar bill. It was taken the next evening from Vera Harper's room, from what she

(Testimony of W. M. Whitney.)

said was her room. There were some letters addressed to her in that room. Mr. Simmons and myself actually took it out of the little box in the drawer. There was quite a little silver in the box and some currency and some trinkets and the whole box and some other things. I think there was a purse also taken down to the room where the prisoners were. Mr. Simmons took that down there. Yes, there was a purse taken down [54] but I took no money out of the purse. On the night of July the 5th Mr. Simmons bought the last three rounds of drinks, making altogether sixteen drinks. It was necessary to buy that many drinks in order to discover that this was intoxicating liquor for the reason that there was very little whisky in the bottle, that is, not very little, but it was not filled, and I was not exactly sure where the cache was, and that is what I wanted to find. I knew that by buying sufficient number of drinks that the immediate supply would be exhausted, and she would have to go to the reserve supply, and we would thereby have a better chance to find out where it was hidden. And the main reason was this: When the whiskey was about to be exhausted at the end of the second round of drinks the defendant, Vera Harper, called up a taxicab company which I had been very anxious to get a hold of, and it occurred to me that by staying there and not arresting them that night that I could be prepared to have someone else present on the following evening, some women, and I could call up the same taxicab company, using

(Testimony of W. M. Whitney.)

the very same name of Alice which this girl had used, and get them to make a delivery to me, and then arrest them with the evidence on them. The next night I did have a woman call up and give her name as Alice, the woman was my wife. My wife gave her name as Alice in my presence. Her name is not Alice. It was about ten or fifteen minutes after we got there that she called up and gave her name as Alice. Some people came in response to that call and delivered a bottle of liquor. On the night of the 6th of July I was there until 10:30, I should say, possibly not so long. I got there near six o'clock. When I first arrived there I found Vera Harper and Lottie Powell on the premises and in the adjoining room, Mrs. Scribner. I think she was in that room. I heard somebody in the room, in the adjoining room. She came into our room from that adjoining room. I did not hear anybody call down and say, "Dinner is ready." I did not know anyone was on the third floor until I heard some noise on the third floor when I was near where this stairway goes up. I was in the hotel ten minutes after the arrest, I think, before I found out that somebody was on the third floor. I was there before I made the arrest possibly about the same length of [55] time. so I was there about twenty minutes before I found out that anybody was upstairs. I did not say I heard anybody call down that, "Dinner is ready." I did not hear it. I did not testify in direct examination that somebody called down. I did not say that.

(Testimony of W. M. Whitney.)

The cook was preparing dinner and she had it on the table, or practically so, when I went up and walked in there. The reason I did not make the arrest on the 5th of July was that I wanted to kill as many *as many* birds with one stone as I could. We do that very often. When I was there on the 6th day of July I never knew that there was anyone else there until after I had arrested the women downstairs. I would have known that somebody was upstairs even though someone had not called it to my attention. I think I would have found that stairway before I got through with the search. I did not attempt on the 5th of July to find out about this stairway leading to the third floor. If I had I would have disclosed my identity as a prohibition agent and I was not ready to do that. On the 6th of July when I arrested these women I did not know that Mr. Scribner was upstairs. I did not know who was the proprietor at that time. On the 6th day of July when Mrs. Scribner came into the room where I and Lottie Powell and Vera Harper were I asked her to have a drink. Vera Harper had already asked her and I asked her also in the course of the conversation. I asked her to have a drink because I wanted to find out everything I could in the place. I was not down there merely to drink the whisky. I was down there to get evidence. She refused to take a drink, then I asked her again. I do not remember the answer she made to Vera Harper, but when I asked her she said she was not feeling very well, and that the

(Testimony of W. M. Whitney.)

girls would take care of us. She then refused a second time. I did not say, "Sit down and be a good fellow and have a drink." Nor did I say, "Come on and let's have a drink." I did not ask her repeatedly to have a drink, I only asked her once. Vera Harper did not tell me that Mrs. Scribner had absolutely no knowledge of the fact that she was selling these drinks. Mrs. Scribner had been in there and saw the bottle and the serving glass and had been asked to drink and saw it there. When Mrs. Scribner came into the room Lottie Powell said, "This is our mamma." They did not actually speak of her to me before I actually saw her. They just said [56] that as she came in. She said, "This is our mamma." And we both spoke to Mrs. Scribner and she spoke to us and sat down. We did not get friendly with her and call her mamma. But we asked her to take several drinks with us and she did not drink. We did not ask Mr. Scribner to have a drink with us. He was upstairs. He did come downstairs. I did not invite him downstairs to have a drink. I invited him downstairs and told him I was a prohibition agent. I never asked him to have a drink any place. I had a couple of talks with him in the course of the evening. I do not recall going to the immigration station with Mr. Scribner, although I may have gone. I think I sent somebody else. Part of the conversation with Mr. Scribner was when he asked me, "Why do you arrest me? You didn't find any liquor in my apartment." There

(Testimony of W. M. Whitney.)

were some words used to that effect. In response to his question I did not tell him, "I will let you out in the morning. We have no case against you, Mr. Scribner." Nor did I tell him, "You will be given a hearing before the United States Commissioner and he will dismiss you. We have no case against you." I think he stated to me something about his bond, of how much his bail would be, and I told him the commissioner would fix that. That I could tell how much it would be. After he asked me whether or not I would require bail from him I told him that bail would be required. Mr. Scribner had told me that his wife was running the place, and I said, "Do you pay any room rent or board here?" and he said, "No." I said, "Do you live in this place?" and he said, "Yes." I said, "Do you live with your wife?" and he said, "Yes, I do." He said that he worked at night in the Bungalow Cafe and was the manager of the Bungalow Cafe up on Third Avenue. I believe it was at that time a cafe and dance pavilion combined. It was at one time like a lot of other dance-halls in the city. I am not certain what the character of it was at that time, as I had not been there. If he told me how long he had been running it I do not remember. If since April of this year, that would be about two or three months. He did not also tell me that he had been living in the city during September, October, November and probably also December of last year. He did not tell me that he had no management or interest at all in these premises or

(Testimony of W. M. Whitney.)

that he had been down in California. I asked him what he was doing around this [57] house of prostitution, and I asked him if he paid any room rent, or paid any board or had any books of account with his wife, or paid her anything, and he said he did not. And I said that he was one of the proprietors, and if he had anything to say about it he could tell it to the Commissioner, and the Commissioner would be the one to judge whether it was enough to hold him on. He said he was a Spanish-American war veteran and I said he ought to know better than to be in the business he was in. I did not tell him that I would let him out to-morrow morning. I told him I would file charges against all of them to-morrow morning and they could put their bail the next morning. I volunteered the statement of "What are you doing around this place of prostitution, or house of prostitution," that night. That statement was prompted because when he was saying that he did not have anything to do with it it was very obvious that he was living there with his wife and that he did have something to do with it. At least it was obvious to me. Mrs. Scribner and the girls both admitted that this was a house of prostitution. I knew this on the 5th of July and I took my wife down there on the 6th of July to find liquor. I had her down there from 5:30 o'clock until 10:30 o'clock. I took my wife down to a house of prostitution and had her telephone and use the name of Alice. We bought liquor from about four or five different concerns.

(Testimony of W. M. Whitney.)

I found this bottle in Mr. Scribner's apartment on the third floor on the washstand. I think there were two or three empty whisky bottles up there. I did not find any other liquor in Mr. Scribner's apartment. I think there were two bonded whisky bottles in the room in the bottom part, as I recall it, of this washstand. I did not say that I was downstairs twenty minutes before I went upstairs to see Mr. Scribner. I did not say it was twenty minutes. Yes, I will say that it was about twenty minutes from the time we entered the place or about ten minutes after the arrest. I was on the second floor about ten or fifteen minutes before I went upstairs to the Scribners' apartment. I did not look at my watch to see as to how it was. But these things went off almost like you would tell them. Mr. Simmons was mistaken if he said I was down there about half an hour before I went upstairs, if he said it was that long. We bought only two rounds before I went upstairs. We arrested them on the second round. When we came into the place [58] we walked right in and sat down. Lottie Powell went out and got a bottle of whisky. We told her we wanted another drink. Nobody ran. It didn't take any longer than merely to make the request and she walked out and went into the second room. It is not true that I was there almost an hour downstairs. There was not enough commotion downstairs when I made these arrests to attract the attention of Mr. Scribner, because he did not know anybody was in the house.

(Testimony of W. M. Whitney.)

The cook had gone ahead and was preparing the meal, and he was very much surprised when I walked up there. At the time I arrested him Mr. Scribner told me that he did not know there was anybody in the house. Vera Harper and I did not get into any altercation at the time I arrested her. and I did not knock over any chairs. I did not touch her arm. I reached over and took the bottle of whisky out of her hand. I did not grab her by the other arm or do anything of the kind. When I had Mrs. Scribner under arrest later on I asked her some questions. She had made many voluntary statements first, and asked me not to take the girls down. She never made the statement at all, "Mr. Whitney, why do you want to arrest me? You have gotten no liquor from me." I do not know whether she was anxious to be arrested or not. She did not tell me, "I had nothing to do with this in any way, nothing to do with it." She pleaded for us not to take the girls because they were not responsible and they were only working for her. She was perfectly willing to go to jail because she knew she had to go. My wife called up two people that night and in one instance she gave her name as Alice. It was the first place she called, the first time. The other agents of whom I spoke of as coming down there: Mr. O'Hara was in the room all the time. I think in the parlor, where the telephone was. Mr. Justi and Mr. Montgomery and Mr. Linfield were downstairs most of the time. I do not know whether Mr. Pickett was there or

(Testimony of W. M. Whitney.)

not. But at the time the three women were arrested there was no one there but Mr. Simmons and myself. I phoned for them. They were waiting at the office until I phoned them. I think I had placed Mr. Scribner under arrest by the time these other agents came down. I am not so sure whether I did—whether I had brought him downstairs or not, but I think I had brought him downstairs by the time or before the other agents arrived, I think I had, I am sure of it now. I am not so [59] sure of the detail, as to whether it was before or after. There is no way I can refresh my memory so as to give the jury accurate information on that. It really does seem to me that Mr. O'Hara was there at the time, but I am not so certain. I know that I had told Mr. Simmons to take the prisoners down to the far room. I am sure that Mr. O'Hara was there. I am not certain, I think he was there but I am not sure. They did not all come from headquarters together. Some remained outside until I called them up. These four or five additional agents did not all come down at one time. I know that because they did not all come upstairs. I think I phoned twice to the office to get some additional help. Mr. Simmons was not upstairs with me at the time I arrested Mr. Scribner. I brought Mr. Scribner and the cook down and put them in Mr. Simmons' charge. I think about that time, or probably a little before, the other agents had come and I put one of the other agents in charge of the prisoners

(Testimony of W. M. Whitney.)

and took Mr. Simmons upstairs to make the search. That is what I was testifying to a few minutes ago. I went upstairs alone, and as I told you when I heard this noise on the upper floor I went up and brought the cook and Mr. Scribner down and put them in Mr. Simmons' charge in this room near the head of the stairs. Then a few minutes afterwards I put one of the agents in charge of the prisoners and Mr. Simmons and Mr. Justi and I began search of the premises and we three went upstairs on the third floor. When I first went up there I was not there alone with Mr. Scribner. I just walked in and saw him there, and I said, "Who are you?" And he said, "I am Mr. Scribner." I said, "I am a federal officer and I want you to come on downstairs with the rest of them here." He said, "I don't know anybody else here in the house." Then I immediately conducted him downstairs. Up to that time I had not found Mr. Scribner's whisky. I do not believe I did find any because Mr. Simmons and I went upstairs and found it on the washstand. The cook was with the other prisoners. I placed the cook under arrest; she was down there; the cook did not go back upstairs until after we searched the premises. I let them all go upstairs and eat dinner before we went down to the immigration station, which was probably an hour and a half afterwards. I went right up on the third floor and walked right in the door and says, "Hello, who [60] are you?" And Mr. Scribner came right down with me. He came voluntary. Why wouldn't

(Testimony of W. M. Whitney.)

he? He was under arrest. The cook also came down with us. I do not know which preceded or followed, but we all three went down at the same time. I thought it necessary to take the cook down there because I had to search the place yet and I was going to get everybody together in one room because there would be no opportunity for anyone to destroy liquor or smash it or conceal it or throw it out of the window. I do not know how many rooms there are altogether upstairs, but there were three right along in a row, the dining-room, kitchen and bedroom of Mr. and Mrs. Scribner. I never went through those rooms at all before I went downstairs. I did not know that there were no other persons in any of these other rooms before I went downstairs with Mr. Scribner. This liquor (referring to Government's Exhibit Number Three) I took out of Vera Harper's hand and kept it. The cork was not in the position that it now occupies, at the time I grabbed it. I turned the liquor over to Mr. Kline and you can ask him what he did with the cork.

Redirect Examination.

My wife gave the name of Alice over the telephone because I wanted to get this taxicab driver to which that name had been given before. One bottle of beer was found upstairs in the ice-box in the kitchen. Mr. Justi found that. I knew he found it because I saw him find it.

TESTIMONY OF WALTER M. JUSTI, FOR THE GOVERNMENT.

WALTER M. JUSTI, a witness produced on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

(By Mr. McKINNEY.)

Q. You are a federal prohibition agent, Mr. Justi? A. Yes.

Q. How long have you been in that service?

A. Over two years.

Q. Did you have occasion on the night of July 6th to visit 201½ Second Avenue, South, the premises known as the Star Rooms? A. Yes.

Q. Did you assist in searching that building?

A. Yes.

Q. I show you Government's Exhibit No. 10 for Identification. Did you ever see that before? and if you know what it is state to the jury.

A. That is the bottle of beer I found in the icebox in the kitchen on the upper floor.

Q. On what floor, the first, second or third?

A. The third floor.

Cross-examination.

(By Mr. BEELER.)

Q. Is that all you found there, this bottle of beer?

[61] A. Yes, that is all I found.

Q. You made a very exhaustive search, did you?

A. I looked through the kitchen thoroughly and looked through the pantry.

(Testimony of Walter M. Justi.)

Q. Did you make an exhaustive and careful search? A. Yes, I believe I did.

Q. I want to find out whether your search was complete all over the house?

A. Not all over the house, no.

Q. Did you look in the drawers and under the beds and all over the place for liquor?

A. No, sir.

Q. Where did you look? A. In the kitchen.

Q. Only the kitchen? A. Yes.

Q. That was the only place?

A. That was the only place that I looked.

Q. On what floor was that?

A. On the third floor.

Q. What time of night did you make this search?

A. I do not recall exactly, but somewhere, I would imagine about 6:30 o'clock, or 6:00.

Q. Who was upstairs at the time you searched this place? A. No one.

Q. Were you there alone?

A. You mean the occupants of the house?

Q. Were you there alone in the kitchen?

A. No, Agent Whitney came in just about the time I opened the ice-box.

Q. Was anybody there besides you and Whitney?

A. No, not when I found the beer.

Q. Did you see the defendant, Mr. Scribner?

A. Yes.

Q. Was he up in his room or was he downstairs?

A. He was on the second floor.

(Testimony of Walter M. Justi.)

Q. Who accompanied you down to the Star Hotel?

Mr. McKINNEY.—I object to that as not proper cross-examination.

The COURT.— Objection sustained.

Q. One more question, Mr. Justi. Was Mr. Simmons upstairs with Mr. Whitney?

Mr. McKINNEY.—I object to that.

The COURT.—Objection sustained. He has already answered that question.

Mr. BEELER.—Exception.

Q. Was Mr. Whitney the only one that was with you?

Mr. McKINNEY.—I object for the same reason.

The COURT.—He has answered the question before.

Mr. BEELER.—Exception.

TESTIMONY OF C. W. KLINE, FOR THE GOVERNMENT.

C. W. KLINE, a witness produced on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

I am a Federal Prohibition Agent. I take charge of all liquor seized by federal agents and analyze it for its alcoholic content. (It was admitted by the defendant that the liquor produced against the defendant contained over one-half of one per cent per volume.) [62] I received this whisky from

(Testimony of C. W. Kline.)

Mr. Whitney. It is fit to be used for beverage purposes.

Thereupon Mr. McKinney offered in evidence Government's Exhibits marked Numbers 1 to 10, inclusive, which exhibits were admitted without objection.

Thereupon the Government rested.

Thereupon the defendant, Vera Harper, entered a plea of guilty to counts 1, 2, and 3 of the information, leaving only count four to be considered by the jury as to the defendant, Vera Harper.

Thereupon the defendants demurred to the sufficiency of the evidence as to the defendant, Vera Harper, on count four of the information, and moved that the case as to the said Vera Harper on the said fourth count be taken from the jury and that she be released under that count; and the said defendants also at said time entered a demurrer to the sufficiency of the evidence as to the defendants, William L. Scribner and Alice Scribner, which said demurrers and motions were by the Court denied as to all the parties, and to which ruling an exception was noted.

TESTIMONY OF VERA HARPER, IN HER OWN BEHALF.

VERA HARPER, called as a witness in her own behalf, being duly sworn, testified as follows:

My name is Vera Harper. I am one of the defendants in this case. I am twenty-four years old. I have never been arrested or convicted of any

(Testimony of Vera Harper.)

offense before in my life. I am now living in the Star Rooms and started to live there a year and a half ago. I was living there in the month of July of this year. I am a dressmaker by occupation, doing day work at the hotel. I first met Lottie Powell, one of the defendants in this case, when I was making a dress for her during the latter part of June. I was there on the 6th day of July, the evening of the 6th day of July, when Mr. Whitney and Mr. Simmons came there. Sometime in the evening Mr. Whitney and Mr. Simmons came up to the Star Rooms and I answered the door, and they asked me for a drink, and I told them that we had none, and they kept coaxing me for a drink, and I said, "No, I have no drinks." Mr. Whitney said, "Oh, yes, you have. Come on and give us a [63] drink." I said, "No, I am not selling any liquor." Mr. Whitney said, "Oh, yes, come on and give us a drink." And they kept on coaxing me so that I did sell them a drink, and they gave me five dollars, and they had a few more drinks. On the way out Mr. Whitney took some silver dollars out of his pocket and laid them on the table and he said, "That is for the rest of the drinks." I do not know whether it was two or three dollars that they left that night. On the 5th day of July Mrs. Scribner was not down in the rooms and she did not know anything about the transaction I had with Whitney and Simmons. Mr. Scribner did not know anything about that, neither of them were there at the time, and neither of them knew that I

(Testimony of Vera Harper.)

had this liquor that I disposed of to these officers. Lottie Powell was not in the hotel at any time on the 5th day of July. She never assisted or did any disposing of the liquor as testified by the officers. I next saw the officers the next evening between 5 and 5:30, July the 6th. Mr. Whitney and Mr. Simmons arrived between 5 and 5:30. Mr. Simmons and Mr. Whitney came in and I answered the door to them again, and they said, "Well, we are back again." I said, "Yes, I see you are." They said, "We would like to have another little shot." I said, "Well, I have none." Mr. Whitney said, "Oh, yes, you have. Come on and give us another little drink." So I took them into the parlor and sat them down, or rather in the sewing-room where I was doing my work, and I took them in there and sat them down. Just as I was going to serve the drinks Mrs. Powell came in for a fitting, and they saw her standing out in the other room and they said, "Hello, there, how are you? Come in and have a drink with us." So Mr. Whitney invited her back and we had one drink, and Mr. Simmons paid me for that drink. And Mrs. Scribner came in during the time between that drink and the next drink to use the phone, and she just looked at us and saw who was there, and turned around and walked out of the room. And Mr. Whitney ordered another drink, and the arrest was made on the second drink. At the time Mr. Whitney wanted to take the bottle away from me I started backing off and he grabbed my arm

(Testimony of Vera Harper.)

and tipped over a chair and a door was slammed and it caused quite a little commotion and noise. On the 5th of July there was a five-dollar bill passed by prohibition [64] agents. This bill was given to me. I put it in my room in the chiffonier drawer in my velvet jewel-box. This money belonged to me and neither Mr. or Mrs. Scribner had anything to do with it. The next day when the officers arrived they found this five-dollar bill still in my box in the chiffonier drawer. Some of the silver dollars that were passed on the 5th of July were also in the box. Some of them were in the desk which I had possession of. That desk was a little chiffonier which Mr. Whitney spoke of as Mrs. Scribner's deck, but it was not. The officers were going to break into the desk and I told Mrs. Scribner that there was no use of them breaking into it, that I had the key, and Mrs. Scribner opened the desk with the key that I gave her. Mrs. Scribner knew nothing about the fact that I had disposed of liquor to these federal prohibition men previous to the time of the arrest on July the 6th. The money that they paid for these drinks on the 6th of July, two dollars, was in the chiffonier, and two dollars was in the room which we were arrested in. At the time of the arrest Mrs. Powell and myself were arrested first by Mr. Whitney. Mr. Whitney asked for the bottle and I held back and he grabbed my arm and took the bottle away from me. Mrs. Scribner happened to be out in one of the other rooms and he went out and arrested her.

(Testimony of Vera Harper.)

Then we were put in one of the big rooms. We were kept there from the time of the arrest until 10:30 or 11 o'clock, before we were taken to the Immigration Station. That bottle (referring to Government's Exhibit Number 10) belonged to me. I put it in the ice-box and was going to have it for my dinner. That serving bottle was the serving bottle from which I served them, but there was not that much liquor in it when I got through serving. It was only about half full when Mr. Whitney took it away from me. I had served eight drinks out of the bottle at that time. It was a third or half full. That bottle (referring to Government's Exhibit Number 4 for Identification) I know nothing of it. I never seen it. I never used the expression of mamma or anything like that to Mrs. Scribner.

Cross-examination.

About one o'clock on the afternoon of July the 5th I was in the Star Rooms. I was there by myself and Mrs. Scribner was upstairs. I have never gone under the name of Lottie Flynn. I have never been [65] *been* arrested by city police. I was there myself at one P. M. on July 5th, 1923, and I never saw Agent Simmons or McCrury in the house. I never sold Simmons or McCrury a drink on July 5th and I never saw them there then. I would not recognize McCrury if I saw him here to-day. There was no drinking on July 3d. I was in the house on that day. I do not occupy this whole second floor by myself. There are roomers on the second floor. We have transients there. I

(Testimony of Vera Harper.)

am not the proprietress of the place. Mrs. Scribner is. I believe there is a register for that hotel. I have seen it. Yes, I know there is a register. I do not know who was the last person registered in the hotel register. We had roomers right up to the time of the arrest. I am a dressmaker and have been in that occupation three or four years. I have done day work in the city of Seattle for different people. I have friends that come to me and one friend usually brings another. One customer usually brings another in that line of business. I was making a white sport dress for Lottie Powell. I was charging her $20.00. I do not know the definite time I put on the dress, but I put in quite a while. I work by the hour. I do not remember how long it took me to make this dress. I charged her $20.00 to make the dress. It is not a fact that I act as what is commonly known as a sporting woman at the Star Hotel. I have never been called a sporting woman and I have never practiced prostitution. I had a dress on when these officers came down there. I don't remember what kind of a dress. I do not know how much money I had in the room that night. There are rooms rented there and some of the money was room money, and some of the money was money that Mr. Simmons gave me. Mrs. Scribner was sick in bed at that time and I was taking care of the rooms. The officers never spoke to Mrs. Scribner. Mrs. Scribner came in to use the phone and walked out afterwards. She did not say a word to them. She was sick

(Testimony of Vera Harper.)

and under the doctor's care. A friend gave me that bottle of beer. I do not know that [66] it is any of your business what his or her name is. I have never gone under the name of Ada Chambers. I do not know whether Mrs. Scribner ever went under any other name than Mrs. Scribner. I had access to the kitchen and put this bottle of beer in Mrs. Scribner's ice-box. I was going to have it after my dinner. I do not know whether Mrs. Scribner knew that I had the bottle of beer in there. I use her ice-box all the time. I was not employed by Mrs. Scribner and have never been employed by her. I have known Mrs. Scribner since I have roomed in the house for a year and a half. I never roomed on the third floor. I paid $5.00 per week for my room. Some times I eat my meals there and some times I do not. When I eat there I give her fifty cents a meal. I was going to have dinner there that night of the arrest. Lottie Powell was not going to have dinner there that night, she was going back to her hotel I suppose. I do not know where she eats. I have known Lottie Powell since the latter part of June of this year. I have seen that book before. It was in the house when I got there. Those figures do not belong to me. That is my name there. I wrote it, but anybody can scratch their name in a book, can't they? That is not my handwriting. The figures do not belong to me. I just scratched my name on there. The figures are not in my handwriting.

At this point Mr. McKinney had the book above

(Testimony of Vera Harper.)

referred to marked for identification as Government's Exhibit No. 11.

Thereupon Mr. Beeler objected to any reference being made to any papers or documents that may have been seized in this hotel without a search-warrant, and specifically objected to any reference being made to Government's Exhibit No. 11 for identification, on the ground that same was seized from the Star Hotel by the prohibition officers without any proper search-warrant to seize books or papers and on the ground that the said Government's Exhibit No. 11 for identification was unlawfully and illegally seized. Which objection was by the Court overruled and to which ruling an exception was entered. [67]

The witness continued: The figures in Government's Exhibit No. 11 are not in my handwriting. That (referring to the signature) is not my handwriting.

Thereupon Mr. McKinney offered Government's Exhibit No. 11 for Identification in evidence, to which offer an objection was interposed, and which objection was by the Court sustained. The witness continued:

I use a White sewing-machine down there. This machine was in the room in which Mr. Whitney and Mr. Simmons made the arrest. At the time the conversation took place with reference to this desk, Mrs. Scribner and we were all in the little room where Mr. Whitney had put us and we heard them breaking through the desk. We did not hear any

(Testimony of Vera Harper.)

conversation. I said to Mrs. Scribner, you had better take the key and open it for them. Mrs. Scribner and Lottie Powell and myself were in the room in which Mr. Simmons was watching us. I heard the cracking of the desk. The doors in the room were not shut all the time. They were not shut tight. They were shut part of the time. We were standing there and we heard them crashing that desk and I told Mrs. Scribner to unlock the desk before they broke it. I knew they were breaking the desk. Mrs. Scribner took the key from underneath a scarf on the chiffonier where I had put it. I told Mrs. Scribner to take the key and unlock the desk. I told her where the key was. I did not take it because Mr. Whitney was letting Mrs. Scribner do a little talking and he was letting me do none. I was talking at that time to Mrs. Scribner, not to Mr. Whitney.

Redirect Examination.

This book here that has been marked as Exhibit No. 11 for Identification, was taken from the Star Hotel. [68]

TESTIMONY OF PEARL RILEY, FOR THE DEFENDANTS.

PEARL RILEY, a witness produced on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination.

My name is Mrs. Pearl Riley. I live in the city

(Testimony of Pearl Riley.)

of Seattle and am a married woman. I have two children. I have lived in Seattle about six years. I was living here during the month of July of this year and also in June. In the month of June, 1923, I was in the Providence Hospital. I went to the Providence Hospital on the 30th day of May and staid there until the 20th of June, where I underwent an operation.

(Mr. McKINNEY.) "I object to anything like an operation, or anything like that."

When I left the hospital I went to live at 603 Marion Street. I know Lottie Powell, one of the defendants here and have known her about two years. I saw her on the 5th day of July of this year. She was at my house at 603 Marion Street. I have known her for two years, and when she went down to Los Angeles we corresponded with each other. She came to visit me while I was in the hospital many times. When I came out of the hospital and was convalescing she came to visit me at my home and stayed sometimes two or three days with me. She was there on the 5th of July during that night.

Cross-examination.

I know that Lottie Powell was married for she told me so. Her husband's name was Powell. My name before marriage was Pearl Holmes. I do not know what Lottie Powell's name was before she was married. I never asked her and she never told me. My husband is in business in Sacramento, California. He has been in Seattle practically all

(Testimony of Pearl Riley.)

of his life until the last few months. He is in the wholesale business down there with his father. They have a wholesale house. I am not working. I know definitely that Lottie Powell was at my home on the 5th of July, 1923, because we had planned to spend the 4th of [69] July together and she came to see me on the 4th and stayed all night of the 4th until the day of the fifth and that night and never left me until the afternoon of the 6th of July. I remember that very distinctly by its relation to the 4th of July. I did not talk to anybody about this case. I never saw Mr. Beeler before. The last time I saw Lottie Powell was just a few days ago.

Redirect Examination.

I am going down the next day or so to join my husband and children in Los Angeles. Last night, after court adjourned, was the first time I ever saw you. Lottie Powell introduced me to you and asked me to come to your office, to discuss the matter with you last night and I came down there to your office. I do not know Lottie Powell's business. I have never asked her.

TESTIMONY OF ALICE SCRIBNER, IN HER OWN BEHALF.

ALICE SCRIBNER, called as a witness in her own behalf, being duly sworn, testified as follows:

My name is Alice Scribner. I am married. William Scribner is my husband. I am in charge of the Star Hotel and have lived there two and a

(Testimony of Alice Scribner.)

half years. I was living there during the month of July. I did not know that any officers had been to the Star Hotel on July 5th and I did not know that any liquor had been disposed of by Vera Harper to the officers on that day. I was there on the night of July 6th. I was sick in bed. On the 6th I was upstairs in my bedroom with my husband, and I wanted to use the phone and I went downstairs, and as soon as I went to the door of this room I saw two men in the room, and I saw Mrs. Harper, and I said, "How do you do." I never talked to the officers and they never talked to me, and I went upstairs. When I went upstairs I met Mrs. Powell coming from the bathroom. She was coming down the stairway, and I suppose she had been to the bathroom, although I never asked her. But I went upstairs and I went to the bathroom myself and I stayed there a few minutes when I heard something just like it was a door that slammed, a noise, and I went downstairs again and when I went to Room No. 2 Mr. Whitney was there and said, "You are under arrest. We are prohibition officers." [70] And he shoved me in front of him into that front room. This Mrs. Powell was there and Mrs. Harper and the other officer Mr. Simmons, and I said, "What does this mean?" He said, "We are officers and you are under arrest." I said, "What for?" He said, "Shut up. You sit down." I said, "No, I do not want to sit down. I want to know"—I thought they were thieves raiding the place. I said, "What

(Testimony of Alice Scribner.)

is your authority? Show me your star." And then Mr. Whitney came up, and I said, "What is the matter that you don't talk?" I never talked to the officers before and they never asked me to have a drink, because I did not stay in the room. I just looked in the room because the phone was there, and when I saw there were other parties there I walked away. I did not at any time sell any liquor to these officers and I did not at any time know that Vera Harper had disposed of or sold any liquor to these officers. I do not believe that she ever did before. I did not know that she had liquor there. The woman that was living upstairs and that was referred to as the cook was my sister-in-law. She was not a cook. Her husband died last year and I was sick. I took sick on the first of July with neuritis. I was in bed three or four days and I asked her to come and take care of my apartment. Her name is Georgia Scribner. She got married again and lives at Index, Washington. I never used the term inmate in referring to these girls when I was talking with Mr. Simmons. Vera Harper or Lottie Powell never used the term of "mamma" in referring to me. Sometimes she called me by my middle name Alice. I never heard her phone using my name. I never heard her myself. When I was arrested I was coming from upstairs, and I was coming into room No. 2, the second room from the stairway and I met Mr. Whitney there; that is where I was. He did not talk to me. He did not want to give me any explana-

(Testimony of Alice Scribner.)

tion until I asked him for the search-warrant and he said, "We do not need any. We have got sale and possession on you." I asked him why he arrested me and told him that he did not find any liquor on me and I didn't sell liquor. [71] Afterwards I asked him not to take me and put me in the Immigration Station. When he told us to put our clothes on I told him I had been sick and I did not feel like going to jail, because he had nothing on me. When the officers were searching the place, I mentioned that if there was anything locked on the place not to break it that I could furnish a key. They did not make an answer to me and they put me in the little room with the ladies and my husband and my sister-in-law, and pretty soon we heard a noise, because that little desk is of hard wood, and it has two big hooks on the padlock, and I heard a big noise and I said I thought they were going to break the doors and I asked Mrs. Harper, and I said that desk is locked and have you got the key and she said it is under the dresser scarf on the chiffonier. Vera Harper never told me that she had gotten some money from these officers for liquor and she never told me that she had given away any liquor on the premises, but the night she was arrested, she admitted it. She never handed me or gave me any money any time except the time that she rents rooms for me. Sometimes I am away and sometimes she rents a room for me. She never gave me any money for the sale of liquor. This liquor, Govern-

(Testimony of Alice Scribner.)

ment's Exhibit No. 4 was never found in my apartment. There was never any whiskey in my apartment and there was no empty bottles. I never had anything whatsoever to do at any time with the handling or sale of liquor on the 5th and 6th days of July, or at any time in that hotel.

Cross-examination.

I have been married to Mr. Scribner for nine years and have been running the Star Rooms for two and a half years. My nationality is French. I have been sixteen years in this country and am a citizen because I am married to an American. I have been running the rooms all the time up to the time I was arrested. Workingmen room there of course. I keep a hotel register. Sometimes I did and sometimes I did not. Sometimes when a man stays in the house a long time I do not register him every day. Sometimes a man don't know how to write [72] his own name. I did not go as long as a week without registering anybody. I was the proprietress of this hotel. My husband had no interest in it, he was just living there. Sometimes I gave him money when he had need for it, sometimes he gave me his money. My name before I married was Alice Dum. I never used the name Ellen Dupont. (Referring to Government's Exhibit No. 12 for Identification.) That is my handwriting. This first check is my check also. That (referring to Government's Exhibit No. 13 for Identification) is my hotel register. It was not the register at the time

(Testimony of Alice Scribner.)

the officers took it. It was at one time the hotel register. That register I found in a room where I kept some linen—in the linen-room. It had been misplaced. Who put it there, I do not know. I do not know when it was misplaced, some time in January, I think. I found it when I went to clean out the room and I just left it in room No. 2. I think it was on top of the chiffonier. I found it before the officers arrested me, it might be a week or a month before. I do not know exactly. I had another hotel register which I kept in the hallway on the table. It was a book like that.

Thereupon Mr. McKinney again offered in evidence Government's Exhibit No. 11 for Identification to which offer an objection was interposed and which objection was by the Court sustained.

The witness continued: I kept my hotel register on the table. This hotel register the day I was arrested was on top of the chiffonier where anybody could see it. I had just come from upstairs when I was arrested. I was in the same room where the register was and the desk which Vera Harper said was hers was in the same room with the chiffonier. I opened the desk. My husband and Mr. Whitney and I think another man whose name I do not know, who testified yesterday. At that time Mr. Whitney had just taken me from the other room where we were prisoners. Mr. Simmons was not present. I know a party by the name of Alice Dugar. She is a friend of mine.

[73]

TESTIMONY OF W. L. SCRIBNER, IN HIS OWN BEHALF.

W. L. SCRIBNER, a witness produced in his own behalf, being duly sworn, testified as follows:

Direct Examination.

My full name is W. L. Scribner. I live at 4433 51st Avenue South, down in Rainier Valley. My wife runs the Star Hotel. I came to the city of Seattle in 1892 about thirty years ago. I have lived about twelve years in Alaska. I came back to Seattle from Alaska in 1917. While in Alaska I was a miner and prospector around the Fairbanks district. When I came out of Alaska I went to Tacoma and opened up the Liberty Dance Pavilion. At the present time I am part owner of the Bungalow Cafe Company on Third Avenue. I became connected with the Bungalow Cafe Company on April 15th last. I was not here at the time my wife became interested in and took over the Star Rooms. I was then living in Los Angeles, California. I came back from Los Angeles on or about Christmas-time, I think. I came back after the holidays and then I went down to Los Angeles and stayed a month, then came back again. After I disposed of my business in Tacoma I was going down to Los Angeles to go in buying and selling second-hand automobiles with a friend of mine that I used to know in Alaska. I had absolutely nothing whatsoever to do with the operation of the Star Hotel and I did not at any time

(Testimony of W. L. Scribner.)

own any of the liquor that was seized by the prohibition officers which had been introduced as Government's exhibits and none of this liquor was at any time in my possession. This little bottle, Government's Exhibit No. 4, was never at any time in my apartment. I knew absolutely nothing about Vera Harper having possession of this liquor, nor that she was dispensing liquor and I never received any money from Mrs. Harper for the liquor that was sold or dispensed by her or handled by her. I did not know of any transaction between Mrs. Harper and the prohibition officials on the 5th day of July and I did not know that any prohibition officers had been in the hotel on that day. I did not know of any transaction or deals or sales that had been made by Vera Harper on the 6th of July. I had a conversation with Mr. Whitney about the [74] fact that we had been in the same war as veterans. He noticed this Spanish War button on me and I noticed one on him and he asked me what outfit I was with in the Philippines, and I told him the First Washington Regiment, and asked him what he was arresting me for. "Well," he said, "We found liquor in your apartment." And when we got down to the Immigration Station I asked him again, "What am I arrested for? You are keeping me away from my business and my partner is up in the hospital with an operation." But he would not even let me send the change to let the boys open up the place, and I had in the neighbor-

(Testimony of W. L. Scribner.)

hood of thirty people working for me, and not a cent in the house to make change. But finally he sent out and sent the money up and that was about ten o'clock when he let me open the place. After we got down to the Immigration Station he said, "You will be turned loose to-morrow." I said, "If I will be turned loose to-morrow by the Commissioner, what are you arresting me for?" He said, "It is just a matter of form." There was absolutely never any liquor at any time in my apartment and never at any time was there any empty bottles or full ones either, in my apartment.

Cross-examination.

Mrs. Scribner has given me money on several different occasions. I bought some property out there. We bought it together, and I had to borrow from her. We have been married nine years. Were married in Juneau, Alaska. My wife's name at the time I married her was Alice Dum. During the month of July, 1922, I think I was here. I was not doing anything. I am the manager of the Bungalow Cafe Company. It is at 1620 Third Avenue, between Pine and Stewart Streets. On the night of July 6th at the time of the arrest I did not know there were other parties in the house. I knew that Mrs. Harper was living there. I never met Lottie Powell and never saw her before the 6th of July. The only racket I heard that night before I was arrested was a door slam. If a table and a chair had been turned over I do not

(Testimony of W. L. Scribner.)

know whether I would or not have heard it from upstairs. The room I was in is directly above the room in which [75] these girls were arrested. At the time Mr. Whitney arrested me I had just completed shaving and I was on my way to the Bungalow. I do not drink. I have not drunk for seven years. While I was in Alaska I drunk once in a while. I do not remember whether my wife gave me any money about June 1st, 1923. I borrowed from her so many times that I cannot just remember. I have been running the Bungalow Dance Hall as manager since the 15th of April, 1923. My income has not been very much up to date, just a nice comfortable living, fair wages. Between the time that I took over the management of this dance hall and the time of my arrest, I borrowed some money from Mrs. Scribner to pay some unpaid bills. I always felt at liberty to ask her for money when I wanted it and she always gave it to me. We borrowed from each other. In reference to her income and mine, from the Star Rooms and the Bungalow Dance Hall, I think I made the most money. I have no other source of income outside of the Bungalow Dance Hall. I had sold some property in the Fairbanks district of Alaska a little bit before that. Mrs. Scribner has no other source of income than from the Star Rooms. There was not a drop of whiskey in my room that night. If one of the agents testified that he found a bottle and serving glass there, he is wrong. It seems to me they are de-

(Testimony of W. L. Scribner.)

liberately falsifying about it. I never knew Mr. Whitney before or any of the federal agents and I would not know one if I saw him. I never had any altercation with any federal officers. Sometimes I take my meals at the Star Rooms. I am not living at the Star Rooms any more because I bought a home and moved in my home. My wife is living with me. She still takes care of the Star Rooms, but she does not live there any more. I do not know how many rooms are rented up there. I pay no attention to that. I was present when the desk was opened. I do not know how long Lottie Powell has been living there. I do not think she ever lived there. I could not say how long Vera Harper has been [76] living there. I am not dependent on Mrs. Scribner for my support. In regard to the money that Mrs. Scribner gave me, I always let my wife handle all the money that I make because she could take care of it better than I could.

TESTIMONY OF LOTTIE POWELL, IN HER OWN BEHALF.

LOTTIE POWELL, called as a witness in her own behalf, being duly sworn, testified as follows:

My name is Lottie Powell. I am one of the defendants in this case. I have been living in California the last several years, and came up from California May the first of this year. I came from Oakland, California, where I have been living for about seven years. When I came up here I went to

(Testimony of Lottie Powell.)

live at the Stanley Hotel, which is located at 9th and Pike and I lived there about three months. I was not at the Star Rooms or Hotel at any time during the day or night of July 5th. I met the defendant Vera Harper about the last of June. A friend of mine told me that she was a dressmaker and I went down there to have her make me a dress. I do not remember just when this was, some time toward the last of June. I know Mrs. Riley, the lady who testified here a little while ago. I saw her during the months of June and July and I saw her while she was at the Providence Hospital. When she left the hospital she went to live at Sixth and Marion Street. I went to stay with her there during the month of July at different times and I was there on the 5th of July. I spent the 4th of July and also the 5th with her. I was not in the house where the officers were on the 5th of July and I had nothing to do with the sale of liquor to any of these officers on the 6th of July. Mr. Whitney's and Mr. Simmons' testimony that I brought out a drink and assisted Vera Harper in the sale of these drinks is untrue. When I came there on the 6th of July I walked up the hall to the room where I had been having my fittings and Mr. Whitney and the other officers were sitting there having a drink and Mr. Whitney asked me to have a drink, and I did not care to have a drink, and they insisted, so I had one drink. Then they arrested us [77] and placed us in the back room and finally took us to the Immigration Station. At

(Testimony of Lottie Powell.)

the time of the arrest there was some commotion and disturbance and altercation. We had one drink and Mr. Whitney ordered another and Vera Harper started to serve another drink to Mr. Whitney and Mr. Whitney started to grab her by this arm, and the chair and table were turned over, and I do not know what else. It looked like a fight to me. I was so excited I did not know what was going on. I never had anything to do with the sale of any liquor at the Star Hotel. I had never met Mrs. Scribner before the arrest was made and I did not use the name to her of "Mama."

Cross-examination.

I don't remember where I was on July the 3d or July 1st. On July 4th I was at Mrs. Riley's home and on July 5th I was at the same place. On July 6th I stayed at Mrs. Riley's home until late in the afternoon and I then went down to have a fitting at the Star Rooms. I never rented a room at the Star Rooms. I happened to meet Miss Harper through a friend of mine who told me she had made dresses for her. I do not think the name of that friend makes any difference. I never went under the name of Lottie Lane. I did not tell Mr. Whitney that my name was Lottie Lane. I work at different things. I have been working in a drug-store lately for about two months. I do not know Mrs. Scribner and have never known her or Mr. Scribner. I saw him on the night of the arrest for the first time. I have never been on the third floor of the Star Rooms. I did not

(Testimony of Lottie Powell.)

see Mr. Whitney on the night of the 5th and I did not sell Mr. Simmons a drink of whiskey on the night of July 3d and I did not sell Mr. Whitney a drink. It is not a fact that I am a common prostitute. I was not going to have dinner at Mrs. Scribner's that night. Mrs. Harper never said I was. I did not have any clothes in the Star Rooms, only my hat and coat. At the time these officers arrested me, I had on the suit I have on now. I did not change clothes that night before they took me to the Immigration Station. I had this dress on. I have been [78] *I have been* married two years and a half. My husband's name is Mr. Powell. We were married in Vancouver, B. C. At the time I was arrested, we had just gotten a divorce. I do not remember the date. This divorce was obtained in Seattle. I have known Mrs. Riley about two years. I met her in Seattle. I do not remember just where. I did not know her before she was married.

Both sides rested.

Thereupon Mr. Beeler made a motion for an instructed verdict of not guilty as to the defendants William Scribner and Alice Scribner on all four counts. And also made the same motion as to Lottie Powell. And made the same motion as to Vera Harper on Count 4, which motion was by the Court denied and an exception allowed.

INSTRUCTIONS OF THE COURT TO THE JURY.

The COURT.—Gentlemen of the Jury: The information in this case is in four counts. Count one charges all of the defendants with possession of intoxicating liquor on the 5th day of July, 1923. Count 2 charges them with the sale of intoxicating liquor on the 5th day of July. Count 3 charges them with the sale of intoxicating liquor on the 6th day of July, and count 4 charges them with maintaining a nuisance at the place described in the information on the 6th day of July, 1923. All of the violations charged in the several counts are a violation of the National Prohibition Act, in that the liquor that was in the possession and the liquor that was sold contained an alcoholic content in excess of one-half of one per cent per volume and was fit for beverage purposes; and count 4 that this liquor was maintained and kept in this place for sale and barter contrary to the provisions of the national prohibition act and therefore constituted a common nuisance under that act.

The defendants have all pleaded not guilty, that means denied the charge in the information. After the Government had introduced [79] its testimony the defendant Vera Harper asked permission to withdraw her plea of not guilty to counts 1, 2 and 3 and to enter a plea of guilty, and that was done this morning and the judgment has been entered against her upon those three counts 1, 2

and 3, upon the plea which she has entered. So you have nothing to do with her with relation to counts 1, 2 and 3. You have only to do with her with relation to count 4 of the indictment.

You are instructed that all of the defendants are presumed innocent of the charges made against them until they are proven guilty, beyond a reasonable doubt and this presumption continued with them throughout the trial and until you are convinced by the evidence and circumstances detailed by the witnesses of their guilt by that degree of proof. The burden is upon the Government to establish that degree of proof which I have indicated.

You are instructed that it is against the law for a person to have in their possession intoxicating liquor, as charged in this information, or to sell the liquor, as charged in this information. It is likewise against the law for a person to maintain a nuisance in any room or place wherein intoxicating liquor is sold or kept by keeping for sale or barter intoxicating liquor in any room.

In this case some of the facts are admitted. It is admitted, for instance, that the whiskey or the liquor that was contained upon these premises contains a prohibited amount of alcoholic content and likewise was fit for beverage purposes. It is admitted that some of this liquor was found upon the premises. Vera Harper admits that she had a beer bottle. I do not know what that exhibit number is; I believe it is number 10. And likewise the other bottle which I believe is exhibit 3,

the larger bottle which she called a serving bottle. There is no dispute of the testimony that the serving glasses were found upon the premises. There is dispute as to where the bottle exhibit 4 was found. The Government contends that it was found in the defendant William Scribner's room, or the room occupied by him and his wife, if I remember the testimony correctly; and he [80] denies that, as does likewise his wife. The beer bottle it is admitted was found in the ice-chest of the kitchen of Mr. and Mrs. Scribner, or the kitchen in the hotel occupied by Mr. and Mrs. Scribner. It is for you, Gentlemen of the Jury, to determine what the fact is with relation to the disputed issue; that is, what relation does the defendant Powell and the defendants Mr. and Mrs. Scribner bear to these charges here. Mrs. Powell denies that she had anything to do with it. Mrs. Harper says she did not have anything to do with it. Mrs. Scribner denies that she had anything to do with it, as does also Mr. Scribner. But Vera Harper says she did have it. Now, it is for you to determine from all these circumstances, and in order to do that it will be necessary for you to take into consideration every fact and every circumstance surrounding all these parties and determine from that whether there was any relation between these parties. It is admitted, for instance, that William Scribner and Alice Scribner are husband and wife and have been husband and wife for nine years. She says she bought this hotel two and a half years ago and has since been

occupying it herself. She said her husband had nothing to do with it. The husband says that he was there at the time and has since bought a home in the Rainier Valley. He likewise stated that he frequently borrowed money from his wife and he also stated that when he made money he gave it to his wife because she could take care of the money better than he could.

You are instructed that a husband and wife living together and having property together and contributing to the family fund, are presumed to own that property together, and if this property was purchased from the common fund, then this hotel was the property of the defendant William Scribner and his wife, both of them.

If she was running this hotel and if the circumstances will bear out the fact that she had an arrangement with one or both of these women to dispense any liquor in this hotel, then she would [81] be guilty, as would likewise her husband, if he knew that was done. If the wife engaged in this sort of business and the husband did not know it, then the husband would not be bound. But if he did know it then he would be bound whether he himself actually did the physical transaction of the making of the sale or not. And that applies with relation to Mrs. Scribner if she, as she said she did, occupied this hotel and managed it. Now then, if she did arrange with Mrs. Vera Harper to run this hotel or any part of it and authorized her or permitted her, with her knowledge and consent, to dispense liquor in that hotel to

persons coming in there or to anybody, then she would be liable for the sale just the same as though she transacted or performed the physical act of completing the barter. And in relation to Mrs. Powell, if she came to this hotel it is immaterial whether she lived there or not or if she lived elsewhere,—if she came down there for the purpose of spending her evenings or nights at the hotel or any part of it, and came there and co-operated and confederated with Vera Harper for the purpose of carrying on the business there of making exchange of whiskey for money or for anything else, then she would be guilty just the same as though she had lived there.

Now then, it will be for you to determine what relation do these people bear. You will have to determine what the facts are. In determining the facts you have to determine upon the credibility of the witnesses. You will have to take into consideration the demeanor of the witnesses upon the stand, the reasonableness of their story, the interest or lack of interest in the result of this trial, and from all these determine what relation do these people bear, where does the truth lie. You will apply that same rule to all the witnesses both for the defendants and the Government.

Considerable criticism is lodged against the witnesses on the part of the Government by the defendants in saying that they testified untruthfully. They testified that they went in there and bought whiskey. Simmons says he bought at one time from Mrs. [82] Powell and gave the circum-

stances. And then afterwards they went in and they bought whiskey from Vera Harper, and they said they exhausted the bottle. When asked why they had so many drinks they said they wanted to find out where the cache was; and they said they exhausted the bottle and Mrs. Harper asked Mrs. Powell to get some whiskey. Mrs. Powell went out and came back with this bottle. You will remember the testimony; don't take it from me, but from the witnesses on the witness-stand. Mrs. Powell says she went there for the purpose of being fitted, and Vera Harper says she was a dressmaker staying at these rooms for five dollars per week for a room at the hotel for dressmaking, and she said she had not been upstairs, that she had not been out of the lower apartment there. Now Mrs. Scribner said she came down for the purpose of telephoning. Then she said she went back for she saw these men there with this woman, and then she went up and met Mrs. Powell coming down the stairs. So there is a discrepancy between their testimony. One said she had not been out of the room, and the other said she came down from upstairs. So it is for you to determine from all the circumstances where the truth lies.

Now a good deal of criticism was offered to witnesses for the Government. You will criticise that testimony. Did it sound reasonable or did it ring true? If it did it is entitled to credit; if it did not it is not entitled to credit. Some criticism was offered to the witness Whitney because he had his wife come down there to a place which he

denominated a place of prostitution; and they asked him on cross-examination why he did that and I permitted him to answer over the objection of counsel for the Government, and he said he took his wife there for the purpose of finding some other parties; that a telephone message had been sent out at another time by one of the women to a certain taxicab company to send up a bottle and she said "This is Alice." Then he said that he had his wife phone and call up these various taxicab companies and say "this is Alice" and [83] to bring up some whiskey. That is why he brought her there. That stands uncontradicted. There is no denial of that on the part of any of the defendants' witnesses that that conversation took place, so it is for you to determine whether the story is reasonable and what was the purpose and motive of it.

Now, the same way with Simmons. Does his testimony ring true. If it does not, disregard it.

Now then, does the testimony of the defendants ring true? Does it sound reasonable? Would the defendant Vera Harper go to a hotel and pay five dollars per week for a room to make dresses or do sewing in? Or if she wanted to do sewing would she go out and have a room where she could be accommodated in that sort of fashion. Does that ring true? Or was the fact that she was doing dressmaking there simply a cloak for the purpose of shielding behind doing something else?

Then another thing you want to take into consideration is this: There is testimony here with

relation to the arrangement of these rooms. The witnesses on the part of the Government called them serving rooms, and they defined the way in which these rooms were fitted up as to tables and chairs, etc. You will have to take that from the testimony. Now, what was the purpose of Vera Harper occupying one of these rooms as a sewing-room? Was it reasonable to have a sewing-room fitted up in that sort of fashion? If the testimony that these rooms were fitted up in that sort of fashion is not so why didn't they deny it? Those are elements to be taken into consideration.

On the other hand, now, is the testimony of the witness Powell reasonable. She went down there to have a fitting. There is no testimony other than her statement and the statement of Vera Harper that there was anything to be fitted with. There was not any testimony that there was anything ready to be fitted; nothing that there was anything prepared for any such purpose at all. You will have to take those things into consideration, not merely the statements of the parties themselves upon either side, but take into consideration [84] the peculiar facts that are disclosed by the evidence and then determine where the truth is. When the witness Powell was asked how she happened to go there for the purpose of having a dress made she said that a friend sent her there. Then she was asked the name of the friend and she declined to give it. What was her purpose in doing that?

What we want here is the fact or facts, and

it is for you to determine what they are, and you will have to take into consideration all of the various elements and circumstances with relation to determining the good faith of this whole transaction. If these parties were simply down there violating the law and trying to shield themselves behind some pretense, then that is a matter to consider. If they were there in good faith and not violating the law, and if the testimony does not disclose—considering all the facts in this case —that they were violating the law, or if you have a reasonable doubt upon that, it must be resolved in their favor. But if you are convinced beyond a reasonable doubt, after taking into consideration all these facts and circumstances with relation to the entire transaction, that they are guilty beyond a reasonable doubt, then it is your duty to convict them; otherwise it is your duty to acquit them.

Now, with relation to the defendant William Scribner and this whiskey alleged to have been found in his room, which he denies, you will take into consideration his testimony and the manner of testifying, his positive denial that he knew anything about it, then all the circumstances which have been detailed here with relation to what transpired, and conclude whether the witnesses on the part of the Government deliberately falsified or whether the defendant did for the purpose of avoiding the penalty which the law fixes.

You will, as stated, take into consideration the interest or lack of interest of the witnesses on the part of the Government. Have they disclosed any

interest or any prejudice in the case which would indicate that they want to perjure themselves for the purpose of punishing innocent persons and swear to something that did not take [85] place. On the other hand, the defendants, if found guilty, must be punished. Now then, would they go to work and concoct such a story and conceive such a plan that would shield them? In view of the testimony did they consent that Vera Harper should plead guilty to the three counts and assume the burden for the purpose of shielding all the others? These are elements for your consideration as twelve fair-minded men. If they are all guilty they should all be convicted. If they are not proven guilty beyond a reasonable doubt they should be acquitted. The Government does not want them convicted if they are not proven guilty beyond a reasonable doubt. But if the testimony shows that they are guilty beyond a reasonable doubt the Government does not want them acquitted and they should not be.

Now then, in regard to the charge of maintaining a nuisance, you are instructed that a public nuisance is a place which harbors anything not authorized by law. The National Prohibition Act describes a nuisance as any room or place where intoxicating liquor is sold, kept or bartered in violation of the prohibition law. Such a place under that Act is declared to be a nuisance.

You are instructed that if the rooms were maintained in this place with tables and chairs for serving purposes and serving liquor or whiskey

and if whiskey was delivered or ordered by telephone for delivery at the place, such a place would be a nuisance. And you are instructed that it is immaterial who owns the place as to whether they are guilty of maintaining a nuisance. If Vera Harper conducted this place alone and it was such a place as I have defined here, then she is guilty of maintaining a nuisance, whether she had anything to do with the ownership of the hotel or not. If Mrs. Powell came there in the evening or the night and co-operated or confederated with the defendant Vera Harper in maintaining this place and entertaining people there by serving drinks, then she would be guilty of a nuisance, provided that she is guilty of making a sale. If Mrs. Scribner, being the owner of the hotel, employed these girls or engaged these girls or either of them to be there to maintain this place and operate it, [86] as testified by Whitney that she said when she came downstairs and was asked to have a drink that she did not want a drink but the girls would take care of them, and knew that whiskey was being sold, then she is guilty of sale and possession and of maintaining a nuisance. And if the defendant, William Scribner, her husband, knew that this was being done and carried on, and participated in it with his wife as a common owner of the property by reason of the community estate, then the defendant William Scribner would likewise be guilty of maintaining a nuisance and likewise be guilty of sale and possession, whether this bottle was found in his room or not.

Another element to be taken into consideration in this case with relation to Mr. and Mrs. Scribner is the beer bottle that was found in the ice-chest in the kitchen, in connection with the circumstances I have related to you.

You can find all of the defendants guilty of all of the counts in the information, as set out in this formal verdict. I have omitted Counts 1, 2 and 3 as to Vera Harper in this verdict, because the plea has already been entered. But you can find the other three defendants guilty of Counts 1, 2, 3 and 4, if you are convinced by the testimony beyond a reasonable doubt. Or you may find either one of them guilty of one or all of the counts. Or you may find any of them guilty of one or all of the counts.

If you find the defendant William Scribner guilty then you must find his wife guilty, because if she is not guilty then he would not be under the testimony in this case. If you believe that the defendant William Scribner did not know about the operation of this hotel or the selling of whiskey as charged here, but he did have possession of this bottle in his room, then he would be guilty of count one only, of possession,—and not guilty of the other counts.

Now a reasonable doubt, Gentlemen of the Jury, is such a doubt as a man of ordinary prudence, sensibility and decision would have in determining an issue of like concern to himself as that before the jury [87] is to the defendants, which would make him pause and hesitate in arriving at a ver-

dict of guilty. Such a doubt should be entertained only if it satisfies you beyond a reasonable doubt that may be created by the evidence itself. It should not be speculative, imaginary or conjectural, but it must be a sensible doubt of the defendant's guilt in the light of all of the evidence, and after a full and fair-minded consideration of the same together with all of the circumstances which have been detailed in the case and not a mere possibility of the defendant's innocence. It must not arise from a misconceived suspicion or kindly or sympathetic feeling. It must be a substantial doubt such as an honest, sensible and fair-minded person might with reason entertain with the conscientious desire to ascertain the truth and perform the duty of a good juryman. A juror is satisfied beyond a reasonable doubt if from a fair-minded consideration of the entire evidence he has an abiding conviction of the charge made against the defendants or any one of them; or if he is satisfied that he is convinced to a moral certainty of the guilt of the party.

I believe that I have covered the case.

Mr. BEELER.—I desire to except to the instructions given by your Honor to the jury. Particularly do I desire to except to that part of your Honor's instructions to the effect that there was no testimony in the case on behalf of the defense that Lottie Powell ever had a fitting of clothing at the Star Hotel, because Lottie Powell so testified and Vera Harper testified that there was a fitting

and that she was making a sport suit for Lottie Powell.

I ask the Court to instruct the jury that even though this bottle of beer was found in the ice-chest of the apartment of Mr. and Mrs. Scribner that that would not be sufficient to make them guilty of possession of it, or possession of any liquor, unless they knew of the fact that the liquor was in the ice-chest. [87½]

The COURT.—You are instructed, Gentlemen of the Jury, that the beer being found in the ice-chest of the defendant, Mrs. Scribner, standing alone, would be presumptively in the possession of Mr. and Mrs. Scribner, because the ice-chest is theirs and therefore everything in the ice-chest is presumed to be theirs and therefore in their possession. It is for them to explain that it was not in their possession and they knew nothing about it. Now, Mrs. Harper says that she put it there and it was hers; that she did not know whether Mrs. Scribner knew anything about it or not, and I believe Mrs. Scribner said she knew nothing about it. It is for you to determine under all the circumstances what the truth is.

With relation to my statements or any statement with relation to any fact in the case or any statement as to the absence of any proof with relation to any fact, what I have said was not for the purpose of conveying to you any opinion of mine, but simply to illustrate some proposition of law which may be involved with the facts, and you will not be guided by anything I said with relation

to any statement either made or omitted, but will conclude upon the facts solely and from the evidence which has been presented from the witness-stand and the circumstances which have been detailed. My only purpose in referring to the testimony and to any circumstances either given or omitted, was simply to illustrate some proposition for your consideration, so that you may fully and duly find what the fact is as twelve fair-minded conscientious men, so that justice may be done in this case to the defendants and likewise to the Government, because that is what courts and juries are for.

This information is not evidence, but is sent out for your information to the jury-room. The verdict is the usual form. It will require your entire number to agree upon a verdict, and when you have agreed you will cause it to be signed by your foreman. [88]

AND NOW, in furtherance of justice and that right may be done, the defendants, William L. Scribner and Alice Scribner and Lottie Powell, tender and present to the Court the foregoing as their bill of exceptions in the above-entitled cause and pray that the same may be setled and allowed and signed and sealed by the court and made a part of the record in this case.

ADAM BEELER,
Attorney for Plaintiffs in Error.

Service of a copy hereof is hereby acknowledged this 20th day of February, 1924.

THOS. P. REVELLE,
United States Attorney.

The foregoing bill of exceptions is hereby settled this 10th day of March, 1924.

JEREMIAH NETERER,
Judge.

[Endorsed]: Lodged in the United States District Court, Western District of Washington, Northern Division. February 20, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 20, 1924. F. M. Harshberger, Clerk. By ————, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. March 10, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [89]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7795.

WILLIAM L. SCRIBNER, ALICE SCRIBNER and LOTTIE POWELL,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendants in Error.

ORDER EXTENDING TIME THIRTY DAYS TO FILE RECORD AND DOCKET CAUSE.

This matter coming on regularly for hearing on the application of the defendants for an order extending the time in which to file and docket the record in the Circuit Court in the above-entitled cause, the Court being fully advised in the premises and good cause being shown,—

IT IS HEREBY ORDERED that the time within which to file and docket the record in the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit, be, and hereby is, extended 30 days from the date hereof.

Done in open court this 3d day of March, 1924.

JEREMIAH NETERER,
Judge.

Service of the foregoing order by receipt of a true and correct copy thereof, is hereby acknowledged this 3d day of March, 1924.

THOS. P. REVELLE,
United States Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. March 3, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [90]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7795.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM L. SCRIBNER, ALICE SCRIBNER and LOTTIE POWELL,

Defendants.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare a transcript of record on appeal to the Circuit Court of Appeals of the Ninth Circuit in the above-entitled cause, and include therein the following:

1. Information and supporting affidavit of W. M. Whitney.
2. Arraignment of each defendant.
3. Plea of each defendant.
4. Record of trial and impanelling jury.
5. Verdict.
6. Motion in arrest of judgment and alternative motion for new trial.
7. Motion for new trial.
8. Decision on motion in arrest of judgment and for new trial.
9. Judgment and sentence of each defendant.
10. Petition of William L. Scribner and Alice Scribner for writ of error.

11. Petition of Lottie Powell for writ of error.

12. William L. Scribner's and Alice Scribner's assignments of error.

13. Lottie Powell's assignments of error.

14. Order allowing writ of error to William L. Scribner and Alice Scribner.

15. Order allowing writ of error to Lottie Powell.

16. Supersedeas of William L. Scribner.

17. Supersedeas of Alice Scribner.

18. Supersedeas of Lottie Powell.

19. Citation on writ of error of William L. Scribner and Alice Scribner.

20. Citation on writ of error of Lottie Powell. [91]

21. Writ of error of William L. Scribner and Alice Scribner.

22. Writ of error of Lottie Powell.

23. Order to consolidate.

24. Order extending time to serve and file bill of exceptions.

25. Bill of exceptions.

26. Order settling bill of exceptions.

27. Defendants' praecipe.

28. Order extending time to file record and docket cause.

ADAM BEELER,
Attorney for Defendants.

We waive the provisions of the Act approved February 13, 1911, and direct that you forward typewritten transcript to the Circuit Court of

Appeals for printing as provided under Rule 105 of this Court.

ADAM BEELER,
Attorney for Defendants.

Received copy of praecipe February 20th, 1924.

THOS. P. REVELLE,
Attorney for Plaintiff,

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. February 20th, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [92]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7795.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WILLIAM L. SCRIBNER, ALICE SCRIBNER, and LOTTIE POWELL,
Defendants.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript

of record, consisting of pages numbered from 1 to 92, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on return to writ of error herein, from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiffs in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [93]

Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate or return, 252 folios at 15¢ $37.80

Certificate of Clerk to transcript of record, 4 folios at 15¢ ..... .60

Seal to said certificate ..... .20

I hereby certify that the above cost for preparing and certifying record, amounting to $38.60, has been paid to me by attorney for plaintiffs in error.

I further certify that I hereto attach and herewith transmit the original writs of error and the original citations issued in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 21st of March, 1924.

[Seal] F. M. HARSHBERGER,
Clerk United States District Court, Western District of Washington. [94]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7795.

LOTTIE POWELL,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

WRIT OF ERROR (LOTTIE POWELL).

The United States of America,—ss.

The President of the United States of America, to the Honorable Judges of the District Court of the United States for the Western District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said District Court, before the Honorable Jeremiah Neterer, between Lottie Powell, the plaintiff in error, as by her complaint and petition herein

appears, and we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid on this behalf,—

DO COMMAND YOU, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, together with this writ, so that you have the same at said city of San Francisco within thirty days from the date hereof, in said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being then and there inspected, said United States Circuit Court of Appeals may cause further to be done therein to correct the error what of right, and according to the laws and customs of the United States of America should be done in the premises.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 11th day of February, 1924, and the year of the Independence of the United States, one hundred and forty-eighth.

[Seal] F. M. HARSHBERGER,
Clerk of the District Court of the United States for the Western District of Washington. [95]

Acceptance of service of within writ of error, acknowledged this 11th day of February, 1924.

THOS. P. REVELLE,
Attorney for Defendant in Error.
B. E. M.

Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 11, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [96]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7795.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM L. SCRIBNER and ALICE SCRIBNER,

Defendants.

WRIT OF ERROR (WILLIAM L. SCRIBNER AND ALICE SCRIBNER).

The United States of America,—ss.

The President of the United States of America, to the Honorable Judges of the District Court of the United States for the Western District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said District Court, before the Honorable Jeremiah Neterer, between William L. Scribner and Alice Scribner, the plaintiffs in error, as by their complaint and petition herein appears, and we being willing that error, if any hath been, should

be duly corrected, and full and speedy justice done to the parties aforesaid on this behalf,

DO COMMAND YOU, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, together with this writ, so that you have the same at said city of San Francisco, within thirty days from the date hereof, in said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being then and there inspected, said United States Circuit Court of Appeals may cause further to be done therein to correct the error what of right, and according to the laws and customs of the United States of America should be done in the premises.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 5th day of February, 1924, and the year of the Independence of the United States, one hundred and forty-eighth.

[Seal] F. M. HARSHBERGER,
Clerk of the District Court of the United States for the Western District of Washington. [97]

Acceptance of service of within writ of error, acknowledged this 5th day of February, 1924.

THOS. P. REVELLE,
Attorney for Plaintiff.

Filed in the United States District Court, Western District of Washington, Northern Division.

Feb. 5, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [98]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7795.

LOTTIE POWELL,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

CITATION OF WRIT OF ERROR (LOTTIE POWELL).

United States of America,—ss.

The President of the United States of America to the United States of America, and to Thomas P. Revelle, United States Attorney for the Western District of Washington, Northern Division, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein the said Lottie Powell is the plaintiff in error, and the United States of America is the defendant in error, to show cause,

if any there be, why judgment in said writ of error, should not be corrected, and speedy justice should not be done to the party in that behalf.

WITNESS the Honorable JEREMIAH NETERER, Judge of the District Court of the United States for the Western District of Washington, Northern Division, this 11th day of February, 1924.

[Seal] JEREMIAH NETERER,
United States District Judge.

Service of the within citation and receipt of a copy thereof, is hereby admitted this 11th day of February, 1924.

THOS. P. REVELLE,
Attorney for Defendant in Error.
B. E. M.

Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 11, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [99]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7795.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WILLIAM L. SCRIBNER and ALICE SCRIBNER,
Defendants.

CITATION OF WRIT OF ERROR (WILLIAM L. SCRIBNER AND ALICE SCRIBNER).

United States of America,—ss.

The President of the United States of America to the United States of America, and to Thomas P. Revelle, United States Attorney for the Western District of Washington, Northern Division, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein the said William L. Scribner and Alice Scribner are the plaintiffs in error, and the United States of America is the defendant in error, to show cause, if any there be, why judgment in said writ of error, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable JEREMIAH NETERER, Judge of the District Court of the United States for the Western District of Washington, Northern Division, this 5th day of February, 1924.

[Seal] JEREMIAH NETERER,
United States District Judge.

Service of the within citation and receipt of a copy thereof, is hereby admitted this 5th day of February, 1924.

THOS. P. REVELLE,
Attorney for Plaintiff.

Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 5, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [100]

[Endorsed]: No. 4252. United States Circuit Court of Appeals for the Ninth Circuit. William L. Scribner, Alice Scribner and Lottie Powell, Plaintiffs in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Received March 24, 1924.

F. D. MONCKTON,
Clerk.

Filed May 12, 1924.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 4252

In the United States

Circuit Court of Appeals

For the Ninth Circuit

WILLIAM L. SCRIBNER, ALICE SCRIBNER, and LOTTIE POWELL,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HON. JEREMIAH NETERER, *Judge.*

BRIEF OF PLAINTIFFS IN ERROR.

FRANK M. EGAN,
Attorney for Plaintiff in Error.
1003-4 Smith Building,
Seattle, Washington.

No. 4252

In the United States

Circuit Court of Appeals

For the Ninth Circuit

WILLIAM L. SCRIBNER, ALICE SCRIBNER, and LOTTIE POWELL,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HON. JEREMIAH NETERER, *Judge.*

BRIEF OF PLAINTIFFS IN ERROR.

FRANK M. EGAN,
Attorney for Plaintiff in Error.
1003-4 Smith Building,
Seattle, Washington.

In the United States

Circuit Court of Appeals

For the Ninth Circuit

WILLIAM L. SCRIBNER,
ALICE SCRIBNER and
LOTTIE POWELL,
Plaintiffs in Error,

vs.

UNITED STATES OF
AMERICA,
Defendant in Error.

No. 7795

WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

STATEMENT OF CASE.

On July 6, 1923, the appellant, ALICE SCRIBNER, was, and for sometime previous heretofore had been, operating a certain lodging house in Seattle,

known as the Star Rooms, located on Second Avenue. (Tr. p. 50). The appellant, William L. Scribner, is the husband of the said Alice Scribner and previous to July 6, 1923, lived at the said Star Rooms with his wife in a separate and distinct apartment, and was not connected with the management or ownership of the Star Rooms, being then engaged as part owner and manager of the Bungalow Cafe in another part of the city, (Tr. p. 106) and on the said 6th day of July, 1923, and for approximately a year and a half previously, Vera Harper had roomed in the said Star Rooms, and was engaged in the dressmaking business. (Tr. p. 91). On the evening of July 6, 1923, the appellant, Lottie Powell, was present in the said Star Rooms, (Tr. p. 92), and about 5:30 P. M., J. A. Simmons and W. M. Whitney, federal agents, visited the Star Rooms and purchased from Vera Harper certain intoxicating liquors. The appellant, Lottie Powell, was present and was arrested with Vera Harper after the purchase, (Tr. p. 92). The agents arrested Alice Scribner in an adjoining room and then proceeded to the third floor occupied exclusively by Scribner and wife, and placed him under arrest. There was no proof of any coercion or participation by William Scribner in the sales or possession, and William Scribner was not present during any of the transactions. (Tr. p. 71).

An Information was filed by the United States Attorney for the Western District of Washington, charging the appellant in four counts with certain violations of the National Prohibition Act. (Tr. p. 1). The witnesses for the Government were excluded. (Tr. p. 9).

During the progress of the trial, one of the witnesses, produced on behalf of the Government, W. M. Whitney, testified in regard to the Star Rooms, that certain rooms therein located were "serving rooms" and a motion was then made in behalf of all the appellants that the testimony of the witness to the effect that these rooms were serving rooms be stricken, which motion was by the court denied and to which ruling an exception was duly noted. (Tr. p. 67).

That J. A. Simmons, a witness produced on behalf of the Government, testified that shortly after the appellants Lottie Powell and Alice Scribner were placed under arrest, Mr. Whitney went upstairs and that Mr. Whitney remained upstairs for approximately one-half hour and that about five minutes after Mr. Whitney went upstairs the said witness himself went upstairs alone. (Tr. p. 62). Mr. Whitney testified that shortly after the appellants, Lottie Powell and Alice Scribner were placed

under arrest he went upstairs, remained there a short time, having placed Mr. Simmons in charge of said appellants and that he then came downstairs, placed the appellants in charge of other prohibition agents who had arrived and that he took Mr. Simmons and Mr. Justi, a federal prohibition agent, and the three of them thereupon went upstairs and conducted a search. (Tr. p. 71). Mr. Justi was called as a witness on behalf of the Government and in direct examination for the Government testified that he was at the Star Rooms on July 6th, 1923, and assisted in searching the building and testified regarding a bottle of beer that he found in the icebox on the upper floor and that on cross-examination the said Justi testified that he made a careful search of the kitchen on the upper floor and also testified that Mr. Whitney came in the kitchen just about the time he opened the icebox and found the bottle of beer and testified that he and Whitney were alone when he found the beer (Tr. p. 88) and thereupon during the cross-examination of said witness, Justi, the following occurred:

Q. Who accompanied you down to the Star Hotel?

MR. McKINNEY: I object to that as not proper cross-examination.

THE COURT: Objection sustained.

Q. One more question, Mr. Justi. Was Mr. Simmons upstairs with Mr. Whitney?

MR. McKINNEY: I object to that.

THE COURT: Objection sustained. He has already answered that question.

MR. BEELER: Exception.

Q. Was Mr. Whitney the only one that was with you?

MR. McKINNEY: I object for the same reason.

THE COURT: He has answered the question before.

MR. BEELER: Exception. (Tr. p. 89).

At the conclusion of the Government's case, Vera Harper, who was one of the defendants, withdrew her plea of not guilty to counts one, two and three of the Information and entered the plea of guilty to counts one, two and three of the Information.

Upon the conclusion of the trial, the jury returned a verdict of not guilty as to all the defendants on count four of the Information and a verdict of guilty against the appellants on the first three counts of the Information.

After the jury had returned verdict of guilty against the appellants on the first three counts of

said Information and a verdict of not guilty on count four thereof and within the time limited by law, under the rules of the court, the appellants, William L. Scribner and Alice Scribner, moved in arrest of judgment, which motion was denied by the court and to which ruling the said appellants duly excepted. The motion was based upon the provisions that the verdict of the jury was inconsistent in that the finding of appellants guilty on counts one, two and three of the Information could not stand with the jury finding the said defendants not guilty on count four of said Information for the reason that the same transaction, the same facts and the same evidence was relied upon by the Government in seeking conviction under count four as under counts one, two and three and if guilty of possession or sale, the appellants must necessarily have been guilty of maintaining a nuisance and even guilty of maintaining a nuisance they were not guilty of possession and sale. (Tr. p. 14).

After the return of the verdict by the jury and within the time limited by law, the appellants moved the court for an order granting to them a new trial, which motion was denied and to which ruling an exception was duly noted. (Tr. p. 16).

ASSIGNMENTS OF ERROR.

1. The verdict as to William L. Scribner is contrary to the evidence and the law.

2. The court erred in not striking and taking from the jury the conclusions of the witness, Whitney, that certain rooms were "serving rooms."

3. The court erred in denying the appellants the right to cross-examine the witness, Walter M. Justi.

4. The court erred in overruling appellants' motion for a new trial.

5. The court erred in overruling the appellants' motion in arrest of judgment.

ARGUMENT.

The argument of the appellants will be grouped under five different points, to correspond with the assignments of error hereinabove set forth.

The first assignment of error relates to the verdict as to William Scribner. The Government's conviction of William Scribner must rest, if at all, upon his position as a principal in the case at bar. The testimony of the Government's witness most favor-

ably construed, in no direct way connects Scribner directly with the sales. The agency of the crime, therefore, must extend from Vera Harper and Lottie Powell to Alice Scribner. There is no admission made by Scribner, his wife, or the two women, which make him a principal or in any way a participant. The marked money and other evidence of the violations were found on Alice Scribner, Lottie Powell, or Vera Harper. No one will contend that the mere presence of William Scribner, or anyone, at a crime, will make him a party to it unless he participates. If we make the crime of the wife, assuming her guilt, the crime of William Scribner, we will find that we are making an actual commission of a crime by two roomers of a rooming house, the crime of the landlady and proprietress, and then by the mere fact of marriage, the crime of her husband. We are enlarging the criminal responsibility of a husband for the wife's actions to include her agents. From common law there has come down a doctrine of the coverture of the wife, being a shield, under which her husband must suffer for her derelictions. This rule of law was at one time sound, but today with the separate status of the wife defined and established, and her rights independent of her husband fixed, it hardly seems a safe or just rule. This separate entity of the wife has reached its full limits

in the State of Washington where women have the same status before the law as men. Remington's Compiled Statutes of Washington provide, under Section 6901-6902 that the Civil disabilities of the wife are abolished, and that married persons may acquire and hold property as if they were unmarried, and that contracts made by the wife, and liability incurred, may be enforced by or against her to the same extent and in the same manner as if she were unmarried. It is not illogical, therefore, to ask this court, in view of the liberality of the State in which the parties are domiciled, to say that married women must now stand alone in criminal responsibility. We have been unable to find in our search any decisions holding the husband responsible for the acts of the *wife's agents.*

A review of the law in this regard is instructive:

> "It is generally held that the husband is not liable for the wife's violation of the liquor laws committed out of his presence and *without his command or consent.*" *33 C. J.* 608.

> "If a married woman commits such an offense of her own free will, not in the presence of her husband, and independent of any coercion or control by him, she herself is criminally liable and he is not." *33 C. J.* 608.

Bailey vs. Commonwealth, 29 Ky. L. 105, 92 S. W. 545, where the husband was convicted for sale

made by his wife, and not shown to be with his knowledge and consent. Chief Justice Hobson stated:

> "The court on this evidence should have instructed the jury peremptorily to find for the defendant. He was not responsible for what his wife did in his absence and without his authority."

Another case is *Pennybacker vs. State.*

> "The presumption of agency is inadmissible. The wife committing offenses without the presence or coercion of her husband is regarded as a *femme sole*—she alone is responsible." *2 Bl.* 484 (Ind.); *1 Chittys Blackstone,* 348.

> "A husband is not liable criminally for his wife's offenses unless he aids, procures or acquiesces in their commission."

> *Lupker vs. Atlanta,* 9 Ga. App. 470, 71 S. E. 755.

Again

> "At common law a wife was not guilty of crimes committed in her husband's presence except treason or murder, but was guilty of those committed in his absence as a crime committed by a wife in the husband's presence was *prima facie* presumed to be the result of his coercion. * * * The modern married women's acts, however, tend to give married women a separate entity for criminal as well as other purposes." *Schouler Domestic Relations* 1921, Sec. 56.

See also:
Mills vs. State, 18 Neb. 575, 26 N. W. 354;
Seibert vs. State, 40 Ala. 60;
State vs. Baker, 71 Mo. 475;
Commonwealth vs. Gormley, 133 Mass. 580;
State vs. Mafoo, 110 Mo. 7, 19 S. W. 222;
Also *30 C. J.* 794 with citations.

We are, therefore, in this case asking that the Government in its prosecution for the violations of the National Prohibition Act, in the State of Washington, be limited to including husbands only in those cases where the husband has concurred or participated in, or approved, the wife's illegal sales, and we are further asking the court to hold that the wife's agents cannot bind the husband by their actions. Otherwise the logical result of such proceedure would be the establishment of an endless chain which finds its source only in the marriage of the husband and makes him involuntarily responsible for every action done by his wife through agents or representatives. We are asking this court to decide that the acts of Vera Harper and Lottie Powell cannot be in law the actions of William Scribner when no connection has been shown with him.

The second assignment of error relates to the court's refusal to strike the testimony on direct examination of W. M. Whitney, to the effect that

the premises occupied by the appellants contained "four serving rooms," although the court instructed the jury, after denying the motion to strike the testimony, that "the jury will not be bound by his (Whitney's) conclusions as to what the rooms were. He simply defined the rooms; let the jury conclude what they were used for." In that instruction, it can be seen that the court ruled the conclusion of the witness should go to the jury because after refusing to strike the same the jury were told that the witness was "simply defining the rooms" and the court finally stated, "There is testimony here with relation to the arrangement of these rooms. The witness on the part of the Government called them serving rooms and they testified the way in which these rooms were fixed up." This instruction was highly prejudicial to the appellants and, even though they were defending themselves on a charge of violating the liquor laws, it is respectfully submitted that they were entitled to have the Government establish its case by the same rules governing the admissability of testimony as applied in the trial of other criminal charges. It cannot be successfully claimed that the finding of the jury under the first three counts of the Information was not largely a result of this incompetent testimony and conclusions of the witnesses and the statement of the trial court.

For years it has been an "elementary proposition of law that a witness must state facts and not his opinions or conclusions." (*16 C. J.* 747.) The case of *State vs. Dushman,* 91 S. E. 809, held:

> "Opinion evidence, should only be admitted after the witness has detailed all the facts and circumstances to the jury and if these can be placed before the jury, and they are of such a nature that jurors generally are just as competent to form an opinion in reference to them, and to draw inferences from them, as the witness, then the opinion of the witness should not be admitted."

The case of *Jones vs. State,* 32 So. 793, held:

> "The opinion of a witness, except as to a matter regarding which expert testimony is competent, is not legitimate evidence as to any matter that may be reproduced before the jury."

The case of *State vs. Morris,* 83 Ore. 429, held:

> "When the matter under consideration before a jury is of such a character that anyone of ordinary intelligence, without any peculiar habits or courses of study, is able to form a correct opinion of the same, expert testimony as to such matter is inadmissible."

And the case of *Barnes vs. State,* 133 S. W. 887, held that an opinion deduced from physical facts, which can be detailed to the jury is inadmissible.

There is another reason why this testimony should be disapproved. It is permitting the prose-

cuting witness to present to a jury not facts, but prejudiced opinions, and permitting a jury to hear from a witness his suspicions and conjectures rather than the truth. It has been said that a zealot is a cousin of a harlot, and testimony that comes from a prejudiced source and his opinions thereon, are opinions of a zealot. The principles of proceedure and constitutional guaranties will not last long if the prejudices of witnesses are introduced into inquiry and juries misled thereby.

It is the contention of appellants under the third assignment of errors, that serious injustice was done them in not allowing the cross-examination of the witness Justi, on important and material matters. The testimony of the Government's witnesses, Simmons and Whitney, was directly opposite regarding the search of the third floor of the Star Rooms, the arrest of the appellant, William L. Scribner, and the discovery of certain liquor in his room. The Government, of course, as can be seen from the bill of exceptions herein, had not made a case against Scribner and in order to have any proof, it was very vital to show the presence of liquor in Scribner's room. It was strenuously urged throughout the trial that it was most peculiar that the testimony of the Government agents was contradictory on this one point, viz: on the finding of the liquor in William

L. Scribner's room. Whitney's testimony, regarding the search of upstairs portion of the Star Rooms was altogether different from that of Agent Simmons, and in addition thereto, Whitney testified that he and Simmons and Justi all went upstairs together and participated in the search. Now the court in passing on the appellants' motion for a new trial when this particular point was urged in overruling the same, states:

> "The fullest cross-examination of Justi was permitted within the rules of evidence. Cross-examination is for the purpose of testing the truthfulness, intelligence, memory, bias or interest of a witness and any question to that end and within reason was here allowed. The most strenuous argument is presented to the court's ruling, declining to permit Justi to be examined with relation to Whitney and Simmons testimony for the purpose of discrediting it. This claim was improper."

But the Honorable District Court, in so ruling, looks at the proposition from a prosecution viewpoint. It is true that had the court allowed the cross-examination desired by the appellants of the witness Justi, there might have been something disclosed that would have discredited the testimony of Whitney or Simmons, or both of them, or it might have shown irreconcilable contradiction which would have discredited the entire testimony in the mind of

the jurors. This is merely a present-day application of the biblical rule of "Susannah and the elders" and the "false in one, false in all" rule. The Honorable District Court states the rule that "cross-examination is for the purpose of testing the truthfulness of a witness," but refused to apply it.

The witness Justi, in direct examination testified that he was upstairs making a search of the premises and the court in its ruling on the cross-examination refused to allow the appellants the right to bring out all features of that transaction, viz, how the witness got there, who was upstairs with him, whether Whitney or Simmons was there and whether or not he, Whitney, and Simmons were all there together. This, it is the contention of the appellants, was reversible error, according to the decisions.

> "It was permissible on cross-examination to bring out other features of the transactions, a part only of which had been disclosed by the testimony elicited, by direct examination of witness." *Hardy vs. U. S.,* 256 Fed. 284 at 286.

> "A fair and full cross-examination of a witness upon the subject of his examination in chief is the absolute right and not merely the privilege of the party against whom he is called and a denial of this right is a prejudicial and fatal error." *Resurrection Gold Min. Co. vs. Fortune Gold Min. Co.,* 129 Fed. 668 at 674.

"It is no answer to a refusal to permit a full cross-examination that the party against whom the witness is called might have made him his own witness, and might then have proved by him or by some other witness, or by some writing, the facts which the cross-examiner was entitled to draw from the testimony of his adversary's witness. No one is bound to make his adversary witness his own to prove facts which he is lawfully entitled to establish by the cross-examination of that witness. The testimony given by a witness on his cross-examination is the evidence of the party in whose behalf he is called and the cross-examiner has the right to bind his adversary by the truth elicited from his own witness. *Wilson vs. Wagar,* 26 Mich. 457, 458; *Campau vs. Dewey,* 9 Mich. 417, 418; *Chandler vs. Allison,* 10 Mich. 460, 473; *New York Mine vs. Negaunee Bank,* 39 Mich. 644, 660. A full cross-examination of a witness upon the subjects of his examination in chief is the absolute right, not the mere privilege, of the party against whom he is called, and a denial of this right is a prejudicial and fatal error. It is only after the right has been substantially and fairly exercised that the allowance of cross-examination becomes discretionary

"Statements in the opinions of courts are called to our attention to the effect that the limit of cross-examination is discretionary with the trial court, but it is only discretionary without the limits of the right of the party against whom a witness is called to a full and fair cross-examination of him upon the subjects of his direct examination, and the right of the party in whose behalf he testifies to restrict his cross-examination to the subjects of his direct examination." *Harrold vs. Territory of Oklahoma,* 169 Fed. 47 at 51.

Assignment four is the identical matter set forth in points one and two and the court's ruling on said points one and two should be the court's ruling on point three.

Assignment Five. Under count four of the Information the defendants could have been convicted either or maintaining a common nuisance or of selling intoxicating liquor on July 6th, 1923, (*Sanlin vs. United States,* 278 Fed. 170). So, therefore, the verdict of not guilty under count four was not only a verdict of not guilty of maintaining a common nuisance but also a verdict of not guilty of selling intoxicating liquors on July 6th, 1923, and was inconsistent with the verdict of guilty under count three of selling intoxicating liquors on July 6, 1923, provided both counts three and four related to the same transactions; that they related to the same transaction affirmatively appears from the records in the case, the supporting affidavit of W. M. Whitney, filed with the Information setting out a charge that the appellants were on the 5th day of July possessing intoxicating liquors and also, on said date, sold intoxicating liquors and on the 6th day of July sold intoxicating liquors, concludes with this statement: "That by reason of the facts hereinabove set forth the said William L. Scribner, Alice Scribner, Lottie

Powell, alias Lottie Lynn, and Vera Harper, on the said 6th day of July, 1923, at said 201½ Second Avenue South, in the city of Seattle, conducted and maintained a common nuisance" and the testimony and evidence introduced shows that the conviction of the appellant under count four was sought by the Government solely by reason of the facts upon which the conviction was sought under the other three counts of the Information.

> "This court has previously held that a verdict of guilty on one count and not guilty on another count, which second count embraces the first count is inconsistent and cannot stand." *Rosenthal vs. U. S.,* 276 Fed. 714.

And this court has also decided that a charge of selling intoxicating liquors is embraced within the charge of maintaining a common nuisance. *Sanlin vs. U. S.,* 278 Fed. 170, and this court has also held that in an information containing two counts, one charging the unlawful possession of liquor and the other the maintaining of a common nuisance, if the two counts related to the same transaction, a verdict of guilty under the first count and not guilty under the second would be inconsistent and could not stand, citing the *Rosenthal* case *supra.* It is respectfully submitted here that it cannot be maintained that count four of said Information did not

relate to the same transaction set out in counts one, two and three.

It is an elementary proposition of law that no form of verdict will be good which creates a repugnance or absurdity in the conviction, *2 Bishop's New Criminal Proceedure,* Section 1015 (5). The point raised here is the identical point passed upon in the case of *Kuch vs. State,* 99 S. E. 622. In that case the defendant was charged in two counts. First, with the offense a misdemeanor for selling spiritous liquors, and, then, with the offense of misdemeanor for having, controlling, and possessing spiritous liquors. The jury rendered a verdict finding the defendant guilty on the first count and not guilty on the second count. The matter was before the court for consideration on a motion in arrest of judgment on the ground of repugnancy in the verdict. The court in its opinion referred to *2 Bishop's New Criminal Proceedure* cited above, and held:

> "The offense of having, controlling and possessing spiritous liquors in this state as alleged in the second count could be committed without making a sale of the spiritous liquors; but the offense of selling which contemplates delivery within the meaning of the prohibition statutes as the culminating feature of the sale * * * could not have been committed without having or controlling or possessing liquor. There would be no inconsistency or repugnancy in a verdict of

> guilty under the second count and not guilty under the first count. But there would be inconsistency and repugnancy in a verdict of guilty under the first count and not guilty under the second count."

The court also cites the case of *Commonwealth vs. Haskins,* 128 Mass. 60, which held:

> "Upon trial on an indictment charging the defendant in one count with larceny of a chattel and in another count with receiving the same chattel knowing it to have been stolen a verdict of guilty on both counts is inconsistent with law and no judgment can be rendered upon it."

This principle was considered in the case of *State vs. Headrick,* 78 S. W. 630. Which case held that a verdict of not guilty on the first count of an indictment charging the defendant with an assault with a deadly weapon, with intent to kill, was inconsistent and repugnant with a verdict of guilty on the second count charging defendant with making an assault with a knife and cutting and disabling the same person with intent to kill.

It is true that in the case of *Bilboa vs. U. S.,* 287 Fed. 125, decided by our Circuit Court of Appeals, held that acquittal on a count alleging nuisance does not invalidate a conviction for an unlawful possession or sale. But examination of this case discloses that the matter really decided is not con-

trary to the principle in cases heretofore cited and discussed. This case simply held:

> "It is claimed, however, that the effect of the finding of the jury that the defendants herein guilty of the charge of maintaining a common nuisance, by keeping in the building intoxicating liquors for sale is, in effect, an acquittal of the charge of possession and sale in such premises; but such is not the *necessary* result."

This holding is not inconsistent with the proposition that the "necessary result" would have been otherwise had the evidence shown that under the charge of maintaining a common nuisance the Government sought conviction by the same evidence and testimony that was necessarily introduced to obtain a conviction under the other counts of the Information.

> "The safest general rule to determine identity is that the two offenses must be in substance precisely the same or of the same nature or of the same species, so that the evidence which proves the one would prove the other; or if this is not the case, then the one crime must be an ingredient of the other." *16 C. J.* 264, Sec. 444. *Grey vs. U. S.,* 172 Fed. 101; *Wilcox vs. U. S.,* 161 Fed. 109; *Berkowitz vs. U. S.,* 93 Fed. 452; *U. S. vs. Three Stills,* 47 Fed. 495; *U. S. vs. Nickerson,* 15 Law Ed. 219; *Ryan vs. U. S.,* 216 Fed. 13; *Stone vs. U. S.,* 64 Fed. 667.

A prosecution for keeping intoxicating liquors for sale between certain dates will bar a subsequent prosecution for a sale within such dates.

State vs. Lesh, 145 N. W. 829.

A conviction of being a common seller of intoxicating liquors is a bar for a single sale within the same time upon ground of a merger.

Com. vs. Mead, 10 Allen (Mass.) 396;
Com. vs. Jenks, 1 Gray (Mass.) 490.

> "Where the facts constitute but one offense; although it may be susceptible of division into parts, a prosecution for any part bars a further prosecution based upon another part." *16 C. J.* 279.

The argument of the inconsistency of the verdict applies with particular force to W. L. Scribner for the reason that the jury found him "not guilty" of maintaining or assisting in maintaining the Star Rooms where liquor was sold or kept for sale, and the only possible theory on which he could have been included herein was because of his connection with the place or his marriage relation with the proprietress. The law must be enforced, but its enforcement becomes ridiculous when the suspicion of agents can convict a man and a jury can return a verdict which frees him from the charge of con-

ducting a place where liquor is sold and convict him of sales in which he did not in any way participate.

In concluding a lengthy brief we reiterate that the verdict is inconsistent, that the defendants have been denied substantial rights and that the conviction of William L. Scribner is a "threadbare verdict." The enforcement of law is a splendid ideal, cherished by Americans, but it can never be completely realized until prosecuting officers are held within constitutional limitations and verdicts are rendered based upon intelligent consideration of the facts.

Respectfully submitted,

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Attorney for Plaintiff in Error.

No. 4252

In the United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM L. SCRIBNER, ALICE SCRIBNER, and LOTTIE POWELL, Plaintiffs in Error

vs.

UNITED STATES OF AMERICA, Defendant in Error

Writ of Error to the United States District Court of the Western District of Washington, Northern Division

Honorable Jeremiah Neterer, Judge

Brief of Defendant in Error

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STATEMENT OF THE CASE

In the afternoon of July 5, 1923, Agent J. A. Simmons went to 201½ Second Avenue and bought three drinks of liquor from Lottie Powell, paying fifty (50c) cents each. About nine o'clock on the

same day Agent Simmons returned with Mr. Whitney when they were admitted by Vera Harper, and okehed by Lottie Powell, and were shown into the serving room. They bought liquor, which was brought into the room by Lottie Powell and served by Vera Harper, and while they were there Vera Harper ordered a bottle over the phone. After the bottle came Whitney ordered, Lottie went and brought back the liquor and served it. On July 6th about five-thirty Mr. Whitney and Agent Simmons returned to the Star Rooms and were admitted by Lottie Powell and the four of them had a drink, Vera Harper serving the drinks. While they were drinking Mrs. Scribner came in and was invited to have a drink, but said no, that she had been sick for the last few days, but that the girls would look after them, and that she, Mrs. Scribner, was the proprietress of the place. The two girls and Mrs. Scribner were then arrested and Mrs. Scribner told the officers not to take the girls that she was the proprietress of the place and that they were working for her, and that they were inmates of the place. They searched the place and one of the officers started to pry open a desk and Mrs. Scribner said, "Don't do that, I have a key," and upon searching the desk marked money was found.

Mr. Whitney testified that he took his wife with him and that she called various parties over the phone, using the name of Alice, and that liquor was purchased from four or five different concerns. Mr. Whitney also testified that he arrested Mr. Scribner on the third floor of the Star Rooms in the living quarters of himself and Mrs. Scribner, and, in this room where Mr. Scribner was arrested, a bottle of intoxicating liquor was found on the wash stand with a serving glass beside it. In the bottom of the wash stand were found two or more empty bonded liquor flasks.

Mr. Justi testified that he searched the kitchen and found in the ice box one bottle of beer, and that he knew nothing about the rest of the premises.

Scribner testified he lived there with his wife, and that she handled all the money for the family.

ARGUMENT.

ASSIGNMENT I

It is contended that the evidence is insufficient to convict the defendant, William Scribner, under the counts the jury found him guilty of on the theory that the acts of the defendants Lottie Powell

and Vera Harper cannot be imputed to him through his wife. The facts show that Scribner lived upon the premises; that he received money from the maintaining of the premises; that he was arrested in a room where intoxicating liquor was found; that he was the husband of Mrs. Scribner who was present when a part of the liquor was drunk; that intoxicating liquor was ordered over the phone from this place from four or five different concerns under the name of "Alice" and was delivered there. There was testimony that Mrs. Scribner handled all the money as she was the best manager.

The evidence as a whole clearly establishes the character of the premises. In view of such evidence it was a question for the jury as to his (Mr. Scribner's) connection with the place. Of course, the evidence is circumstantial but in view of the character of the premises and the conduct of the parties upon it, it is reasonably a question for the jury against the defendant, Scribner.

Ferry v. U. S. and four other cases, 292 Fed. 583, 3 C.

In the above case the defendant was convicted of maintaining a nuisance for the sale of intoxicating liquor by a bar tender in the absence of defendant

Ferry, and commenting upon the case, the court said:

"So viewing the case, we are of the opinion the court, in the light of the evidence, committed no error in sending the case to a jury, instead of directing them as a matter of law to find Ferry not guilty; for, if such was the law all a violator need do would be to furnish the premises, the illegal liquor, and the equipment for doing business, and keep out of sight, when the barkeeper was doing what the proprietor of the place wanted, meant, and placed him there to do, for truly the law is not so blind to the real state of things as to allow any such course of conduct to prevail."

Parks v. U. S., 297 Fed. 834.

In the above case T. W. Parks and Emma Parks were husband and wife and were charged with the unlawful possession of certain intoxicating liquors. T. W. Parks, the husband, was absent from the premises when the search was made. The wife testified that the liquor was hers; THAT THE PREMISES BELONGED TO HER; that her husband knew nothing of the traps and whiskey and that she had the liquor for her own use and served it at parties given to her friends. T. W. Parks also testified that he knew nothing of the liquor. The court issued a verdict affecting both of them and in commenting upon the case said:

"The finding of intoxicating liquors concealed in cement traps was evidence from which the jury could infer the guilt of the husband. Such traps are not usually made by women to conceal liquor from their husbands. . . . . The jury was at liberty to accept all or any part of the testimony of the defendants."

Assignment II

The evidence shows that the witness, Whitney, testified that:

"After we got inside she stopped to talk to us in the hallway and just as we started the conversation Lottie Powell came out of one of the SERVING ROOMS (that is one of the rooms where they had been served liquor) along this long hallway and said: 'Oh, they are all right.' Then they took us down to the room furthest north, which is in the northeast corner. We entered this room, the bell rings if you go up and if you open the door it rings a bell and some of these women come out and meet you. There are four serving rooms along there. Right alongside of this hallway."

After that counsel for the government asked the witness to describe the rooms. Counsel for the defense objected to the description of the rooms, and moved the court to strike the testimony about the serving room, to which no objection had been made, and the court refused, but instructed the

jury at this point, before the case had gone any further:

"I will say in this connection that the jury will not be bound by his conclusions as to what the rooms were. He is simply defining the rooms. Let the jury conclude what they are used for."

Nothing was asked the witness upon cross-examination by counsel for the defense about the rooms and the motion was not renewed.

Wigmore, volume I, section 559.
Kinser v. U. S., 231 Fed. 556 Ct. 558.

It is plain to be seen that no rule of evidence has been violated, and the defendant's rights were not prejudiced. If the witness had said: "We went through the kitchen, dining room or hallway" he would have been stating just as much a conclusion as when he said "serving room." The witnesses had been served intoxicating liquor in these rooms. They described the rooms and it is plain to be seen from the character of the place that the rooms were used for nothing more than serving rooms.

The evidence shows that upon the entrance to the premises a bell rang upstairs and one of the girls met the visitors in the hall and invited them into the rooms. The jury had all of this evidence before them and under the instructions of the court could

judge for themselves what the rooms were used for. Section 1246 C. S. 1923 Sup.

Assignment III

It is contended that the court erred in directing the cross-examination of the witness Justi. (Tr. p. 87-89.)

Testimony of Walter M. Justi, for the Government

Walter M. Justi, a witness produced on behalf of the government, being duly sworn, testified as follows:

Direct examination (By Mr. McKinney):

"Q. You are a federal prohibition agent, Mr. Justi?

"A. Yes.

"Q. How long have you been in that service?

"A. Over two years.

"Q. Did you have occasion on the night of July 6th to visit 201½ Second Avenue South, the premises known as the Star Rooms?

"A. Yes.

"Q. Did you assist in searching that building?

"A. Yes.

"Q. I show you government's exhibit No. 10 for identification. Did you ever see that before? And if you know what it is state to the jury.

"A. That is the bottle of beer I found in the icebox in the kitchen on the upper floor.

"Q. On what floor, the first, second or third?

"A. The third floor."

Cross-examination (By MR. BEELER):

"Q. Is that all you found there, this bottle of beer? (61.)

"A. Yes, that is all I found, there.

"Q. You made a very exhaustive search, did you?

"A. I looked through the kitchen thoroughly and looked through the pantry.

"Q. Did you make an exhaustive and careful search?

"A. Yes, I believe I did.

"Q. I want to find out whether your search was complete all over the house?

"A. Not all over the house, no.

"Q. Did you look in the drawers and under the beds and all over the place for liquor?

"A. No, sir.

"Q. Where did you look?

"A. In the kitchen.

"Q. Only the kitchen?

"A. Yes.

"Q. That was the only place?

"A. That was the only place that I looked.

"Q. On what floor was that?

"A. On the third floor.

"Q. What time of night did you make this search?

"A. I do not recall exactly, but somewhere, I would imagine about 6:30 o'clock or 6:00.

"Q. Who was upstairs at the time you searched this place?

"A. No one.

"Q. Were you there alone?

"A. You mean the occupants of the house?

"Q. Were you there alone in the kitchen?

"A. No. Agent Whitney came in just about the time I opened the icebox.

"Q. Was anybody there besides you and Whitney?

"A. No, not when I found the beer.

"Q. Did you see the defendant, Mr. Scribner?

"A. Yes.

"Q. Was he up in his room or was he downstairs?

"A. He was on the second floor.

"Q. Who accompanied you down to the Star Hotel?

"MR. MCKINNEY: I object to that as not proper cross-examination.

"THE COURT: Objection sustained.

"Q. One more question, Mr. Justi. Was Mr. Simmons upstairs with Mr. Whitney?

"MR. MCKINNEY: I object to that.

"THE COURT: Objection sustained. He has already answered that question.

"MR. BEELER: Exception.

"Q. Was Mr. Whitney the only one that was with you?

"MR. MCKINNEY: I object for the same reason.

"THE COURT: He has answered the question before.

"MR. BEELER: Exception."

The witnesses, Simmons and Whitney, had previously testified, in referring to the find upstairs, of the arrest of the defendant Scribner. It was contended that there was a discrepancy between their testimony in referring to the time and manner in which they went upstairs. It is plain to be seen from the evidence in the cross-examination of Justi that counsel for the defense was trying to discredit the evidence of two other government wit-

nesses by Justi, upon matters that he had not testified to on direct examination. The witness had not been called by the defense and was still a government witness and under the most liberal rulings of cross-examination the defense had no right to cross-examine Justi upon matters that he had not testified to. There was no effort made to discredit the witness Justi but the purpose was to discredit the testimony of the other two witnesses' cross-examination. Cross-examination, as I understand it, is for the purpose of testing the truthfulness, candor, intelligence, memory, bias, or interest of the witness, and any question to that end, within reason, is usually allowed, and anything beyond that is a matter of discretion with the court.

Thompson v. U. S., 144 Fed. 14.

Wigmore on Evidence, volume II, page 1709.

The rule on this subject in the national courts is that the party in whose behalf a witness is called has the right to restrict his cross-examination to the subjects of his direct examination, and a violation of this right is reversible error.

Heard v. U. S., 255 Fed. 829 at 833,

and the cases cited therein.

Camp Mfg. Co. v. Beck, 283 Fed. 705.

Assignment V

It is contended that because the jury found the defendants guilty of sale and possession and returned the verdict of not guilty on the nuisance count that it was error as being an inconsistent verdict. It is plain to be seen that the crimes charged were separate and distinct crimes, not inclusive, as there was evidence for the jury to find them guilty on the fourth count, and it is plain to be seen that the verdict was a compromised verdict. The court has passed upon this question twice and sustained it.

Carrigan v. U. S., 290 Fed. 190.
U. S. v. Bilboa, 287 Fed. 125.
Woods v. U. S., 290 Fed. 957.
Marshallo v. U. S., 298 Fed. 74.
Corbin v. U. S., 205 Fed. 278.
Ferry v. U. S., 292 Fed. 283.

The court instructed the jury upon the facts, that if they did not believe that a nuisance was maintained there, that it was not a question for the discretion of the court but for that body of men.

In *U. S. v. Carrigan, supra*, the court said:

"A verdict that is apparently inconsistent affords no basis for reversal of a judgment predicated thereon, when the evidence is sufficient to support either of two separate offenses."

Respectfully submitted,

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